

**U.S. Department of Labor**

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**Issue Date: 04 May 2005**

**CASE NO.: 2004-LHC-1368**

**OWCP NO.: 07-164967**

**IN THE MATTER OF:**

**ROBERT W. MYERS**

**Claimant**

**V.**

**SGS COMMERCIAL TESTING & ENGINEERING, CO.**

**Employer**

**AND**

**AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA**

**Carrier**

**APPEARANCES:**

**BILLY WRIGHT HILLERIN, ESQ.**

**For the Claimant**

**KEVIN A. MARKS, ESQ.**

**SCOTT D. GREENWALD, ESQ.**

**For the Employer/Carrier**

**Before: LEE J. ROMERO, JR.**

**Administrative Law Judge**

**DECISION AND ORDER**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Robert W. Myers (Claimant) against

SGS Commercial Testing & Engineering, Co. (Employer) and American Casualty Company of Reading, Pennsylvania (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on November 4, 2004, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 34 exhibits,<sup>1</sup> Employer/Carrier proffered 20 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.<sup>2</sup>

Post-hearing briefs were received from Claimant and Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order:

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<sup>1</sup> Claimant submitted 31 exhibits at formal hearing and submitted the remainder of his exhibits after formal hearing. Employer did not object to Claimant's Exhibit Nos. 33 and 34, consequently, these exhibits are received into the record. Employer filed a "Motion to Exclude Evidence" which urged the exclusion of handwritten notes pertaining to a "fractionated upper extremity nerve conduction study" dated November 2, 2004 and made by an "unidentified individual," as well as the exclusion of handwritten office notes dated November 10, 2004. The records identified by Employer were submitted post-hearing and are contained in Claimant's Exhibit No. 32. In support of its motion, Employer argues the undersigned refused to accept the November 2, 2004 notes into evidence at formal hearing due to their "lack of reliability." Employer further argues the November 10, 2004 notes should be excluded because they are similar in fashion to the November 2, 2004 notes and are "largely illegible and should be given no probative value." It is noted that the medical record dated November 2, 2004 was introduced into the record at formal hearing without objection from Employer. Consequently, I find no reason to exclude the November 2, 2004 notes contained within Claimant's Exhibit No. 32 as the same documents were introduced into the record without objection at the time of formal hearing. Although the undersigned questioned the value to be placed on the "latency wave results," Claimant submitted an interpretative report of the November 2, 2004 notes as Claimant's Exhibit No. 34. I further accept the November 10, 2004 notes which pertain to a regularly scheduled office visit. Despite Employer's contentions, I find the November 10, 2004 note identifies Dr. Fleet as the examining physician and further find it more similar in form to the medical records submitted in Claimant's Exhibit No. 20, which was introduced into the record at formal hearing without objection.

<sup>2</sup> References to the transcript and exhibits are as follows: Transcript: Tr.; Claimant's Exhibits: CX-\_\_\_\_; Employer/Carrier Exhibits: EX-\_\_\_\_; and Joint Exhibit: JX-\_\_\_\_.

## **I. STIPULATIONS**

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant was injured on September 17, 2002 or September 18, 2002.
2. That there existed an employee-employer relationship at the time of the accident/injury.
3. That the Employer was notified of the accident/injury on September 18, 2002.
4. That Employer/Carrier filed Notices of Controversion on May 1, 2003 and January 21, 2004.
5. That an informal conference before the District Director was held on February 26, 2004.
6. That Claimant received temporary total disability benefits from September 19, 2002 through April 20, 2003 at a compensation rate of \$386.70 for 32 weeks.
7. That some medical benefits for Claimant have been paid.

## **II. ISSUES**

The unresolved issues presented by the parties are:

1. Causation; fact of injury; compensability.
2. The nature and extent of Claimant's disability.
3. Whether Claimant has reached maximum medical improvement.
4. Claimant's average weekly wage.
5. Entitlement to and authorization for medical care and services.
6. Wrongful termination.
7. Attorney's fees, penalties and interest.

### III. STATEMENT OF THE CASE

#### The Testimonial Evidence

##### Claimant

Claimant testified at formal hearing and was deposed by the parties on September 10, 2004.<sup>3</sup> He attended school through the ninth-grade, obtained a GED, and attended two semesters of college at Southeastern Louisiana University. Claimant testified that he worked in construction and bail bonds in the few years prior to formal hearing. (Tr. 44-45).

Claimant worked for Employer for ten weeks, beginning in July 2002. (Tr. 46, 118). His immediate supervisor was Chuck Sanford. (Tr. 118). He was hired as a field or barge surveyor to work at various locations along the Mississippi River. As a surveyor, his duties were to "draft barges, take temperature readings, collect samples, and so forth."<sup>4</sup> He collected samples of "anode grade coke and fuel grade coke" from the barges. (Tr. 47-48).

Claimant was required to have the following safety equipment when on the river: a hardhat, a personal flotation device, safety glasses, and steel-toed boots with skid-resistant soles. He testified that he wore all of the required safety equipment. (Tr. 119-120). In terms of equipment to perform his job duties, he was required to have the following items when surveying an "empty barge": surveying tape, surveying sheets in a "little pad with a little clipboard," a "lumber crayon" for marking on the barge, and a pen or pencil. (Tr. 120-121).

When surveying a "loaded barge," Claimant also used "surveyor's tape with a T-square" and a temperature probe. (Tr. 48, 121). The temperature probe measured approximately seven feet in length. He testified that the anode grade coke consisted of pieces slightly larger than charcoal, while the fuel grade coke, or "shot coke," consisted of "bb" sized pieces.

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<sup>3</sup> Claimant's deposition testimony was not submitted into the record by either party.

<sup>4</sup> Claimant testified that "drafting a barge" was a method of determining how much cargo a barge was carrying. (Tr. 47). Claimant would measure the distance from the deck of the barge to the top of the water at several locations along the sides of the barge, the stern, and the front. (Tr. 51).

He testified that he had to lift his arms overhead to put the "pole" into the product and had to use both arms to shove the temperature probe into the anode grade coke. (Tr. 49-50).

Before Claimant sustained the alleged work injury, he worked in New Orleans, Gonzales, Port Allen, and Baton Rouge, Louisiana. (Tr. 52). He would drive to "the location" and take a boat "into the fleet along the river." He would perform the drafts and then the boat would take him alongside the barge where he would "step off onto the barge" to do the survey. (Tr. 51-52). Claimant did not have to access the barges from a boat at Exxon-Mobile in Baton Rouge, where he spent most of his time. (Tr. 52).

At the Exxon-Mobil facility Claimant climbed up a set of stairs, rather than a ladder, to board an empty barge. (Tr. 123). However, on a loaded barge, the "draft" was closer to the dock and he would simply step onto the barge. (Tr. 124). His job as a surveyor required the use of a "vertical ladder" when "going from a barge to another barge" or "checking inside of a tank." (Tr. 163).

Claimant testified that barges were loaded for "various parts companies or distributors" at the Exxon-Mobile in Baton Rouge. (Tr. 52). AIMCOR was in charge of the loading/unloading operation, while Employer's inspectors/surveyors were to draft barges, sample coke, take temperature readings, and survey the loaded and unloaded barges. (Tr. 53). The Exxon-Mobil facility was run by AIMCOR, which is the entity responsible for permitting access to the dock. (Tr. 124). As an employee of Employer, Claimant was authorized to be on the facility. (Tr. 125).

At the time of Claimant's accident, he was surveying a barge with Kevin Toussaint, who was training for a surveyor position. (Tr. 58). Prior to his injury, Claimant usually performed surveys alone. (Tr. 59).

Claimant received assignments when AIMCOR personnel called him at his home. He worked night shifts from seven at night until seven in the morning. (Tr. 59-60). He earned \$9.00 per hour.<sup>5</sup> He testified that he was paid for the time he was required to be at the dock or on the barge, plus additional time for driving time "to and from the plant itself." (Tr. 60).

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<sup>5</sup> Claimant's wage statement indicated he was paid on six occasions and received an hourly rate of \$9.00. (Tr. 65, CX-8).

Claimant would either leave the facility after measuring the barge, or he would remain at the dock if another barge was brought in line to be loaded. (Tr. 60-61). He had access to the control tower, a building "off of the dock area," or a small office where employees were allowed to sit. (Tr. 61-62). He also used the small office to complete his reports and fax the reports to Employer. (Tr. 62).

Claimant's position required access to the AIMCOR telephone lines in the control tower and the office. (Tr. 62). He occasionally used the phone lines for personal calls to his home.<sup>6</sup> (Tr. 62, 158-159). Claimant testified the phone lines were accessible to other employees, including AIMCOR employees and Exxon employees. (Tr. 62). Prior to the alleged work injury, Claimant and other employees were instructed that they could no longer make personal phone calls from the AIMCOR phone line.<sup>7</sup> (Tr. 63).

Prior to the alleged work injury, Joel Rusche questioned Claimant about bringing unauthorized personnel onto AIMCOR property. Claimant admitted that he brought his fiancée to the AIMCOR location one night and she remained in his car while he taped a barge. He testified that he was not aware that such activity was prohibited and he never again brought unauthorized personnel with him. (Tr. 63-64, 161-162). Claimant also testified that he never brought a prostitute to the AIMCOR location and that Mr. Rusche never confronted him regarding such an incident. (Tr. 64-65, 161).

Claimant alleges he sustained an injury in the early morning of September 18, 2002, between 11:30 PM and 3:00 AM. (Tr. 66, 122). According to Claimant, the lighting at the dock was "not very good." Claimant was required to be on the water to perform a survey and he usually carried a flashlight. (Tr. 66). He believed he loaned his flashlight to Mr. Toussaint on the night of the alleged injury. (Tr. 66, 121).

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<sup>6</sup> Claimant denied making long distance phone calls to Florida. He did not know anyone in Florida as of September 18, 2002. At the time of hearing, he knew one person in Pensacola, Florida, whom he identified as the mother of Mike Ayers, the owner of Mike's. (Tr. 159, 169).

<sup>7</sup> Claimant testified he did not receive any verbal warnings or reprimands from Employer regarding inappropriate activities. He did not consider the discussion regarding personal phone calls to be a "verbal warning." Further, Claimant was not provided any written documentation regarding a warning. (Tr. 101-102). He further denied being confronted by Mr. Rusche, AIMCOR's representative, regarding use of the AIMCOR phone. (Tr. 159).

At the time of the alleged accident, Claimant was working on a barge that was docked between the "stationary dock" and the "floating dock." (Tr. 72). He testified that barges "tie-up" to the stationary dock using a rope that hangs down approximately 15 to 20 feet from a metal structure above the dock. The rope is tied to the "cleats" on the port or starboard side of the boat. (Tr. 74). He further testified that "CCI" and Exxon-Mobil employees would "tie-off" the barges.<sup>8</sup> He did not know who "tied-up" the barge on the night of his injury. (Tr. 75).

When the alleged accident occurred, Claimant was taking "freeboard readings" on the starboard side of an empty rake barge, while Mr. Toussaint performed "tank readings" and "freeboard readings" on the port side of the barge. (Tr. 66-67, 122). Claimant's feet "went out from underneath" him as he walked to the edge of the bow to "throw [his] tape over." Claimant testified that he "went over the bow of the barge and caught [himself] on the bowline . . . ." He testified that he caught the bowline with his left arm and then used his right arm to pull himself back onto the barge.<sup>9</sup> (Tr. 67). He indicated that he saw "shot coke" all over the deck of the bow, or front, of the barge. (Tr. 77).

On cross-examination, Claimant agreed that his inspection form indicated the barge deck was "free of foreign material, including previous cargo." Claimant interpreted the inspection form to mean there was "no excess material on the deck." (Tr. 133-134). On redirect-examination, Claimant indicated that the barge was "acceptable" in its condition because the deck was free of "large mounds" of material. (Tr. 166). As the surveyor, Claimant judged the cleanliness of the deck. According to Claimant, a barge was "rejected" only when the surveyor found "big clumps." (Tr. 167).

Claimant testified on cross-examination that most of his work at the Exxon-Mobil facility occurred "dockside." He testified the accident occurred while measuring the "draft of a barge at its bow." Claimant's Exhibit No. 29 showed a gentleman "performing a draft measurement off the top of the bow on a rake barge." At hearing, Claimant testified that he was positioned in a similar area on the barge when his accident occurred.

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<sup>8</sup> The record does not offer any additional information regarding the meaning or duties of "CCI."

<sup>9</sup> Claimant was able to climb onto the barge by "hooking a leg" and climbing "hand over hand" up the line attached to the port cleat. (Tr. 77).

Although Claimant testified at his deposition to being "more toward the starboard side," it was noted at formal hearing that the gentleman in the exhibit appeared to be "a little bit more to the starboard side, too." (Tr. 129-130; CX-29).

Claimant agreed the barge was moored to the dock on the starboard side on the night of the alleged accident. (Tr. 130). He testified the barge was also tied to the dock by a line attached to a cleat on the port side of the bow. (Tr. 75-76, 130, 135). He further testified that he fell between the two lines and was able to catch onto the port line. (Tr. 135-136). He caught the rope with his left hand and then caught it with his right hand.<sup>10</sup> (Tr. 173). On re-direct examination, Claimant testified that the port line was hanging approximately two and one-half to three feet "in front of the forward most point of the rake bow." Claimant affirmed the port line would have been within his reach. (Tr. 165). Additionally, Claimant estimated a new rope would measure three inches in diameter. (Tr. 134-135).

As Claimant caught the line with his left hand, his "arm extended out and it jerked down." He heard a "popping noise" in his shoulder. He testified that his body jerked down because his arm was attached to the line. (Tr. 77-78). On cross-examination, Claimant testified that he did not yell for help, although he probably "made a noise." (Tr. 142). He agreed that he pulled himself back to the barge primarily using his right arm. (Tr. 142-143).

Claimant testified he was carrying his tape in his left hand, and a clipboard in his right hand at the time he fell over the bow. However, neither his tape nor his clipboard fell into the water; both objects fell onto the deck of the barge from which he fell because he "fell backwards." (Tr. 137, 168). Additionally, Claimant's hardhat did not fall into the water. He testified that his safety goggles fell onto another barge that was situated approximately two and one-half feet in front of the bow of the barge on which Claimant was working. (Tr. 137-138).

Mr. Toussaint was the first person Claimant contacted after returning to the barge. (Tr. 143). Claimant told him that he fell and hurt his shoulder.<sup>11</sup> (Tr. 78). However, he could not recall if he told Mr. Toussaint that he caught himself on the

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<sup>10</sup> Claimant is left-hand dominant. (Tr. 173).

<sup>11</sup> Claimant denied telling Mr. Toussaint that he hit his shoulder on a "knuckle." (Tr. 79).

bowline or if he told Mr. Toussaint that he was suspended over the water. (Tr. 143). Mr. Toussaint told Claimant that he had not seen the accident. (Tr. 78).

Claimant relayed the incident to two AIMCOR employees who were working on the dock. Both employees told Claimant that they had not seen the accident. (Tr. 78). Claimant was not asked to fill out an accident report, nor did he discuss the accident with Joel Rusche. (Tr. 146).

Claimant testified he unsuccessfully tried to contact Employer's main office on the night of the accident.<sup>12</sup> He did not seek emergency room treatment, but he had an appointment for a yearly checkup with Dr. Leckie, his family doctor, on the next day, who treated him for his diabetic condition. (Tr. 80, 83, 145). In the morning, Claimant explained the situation to Mr. Serie, who instructed him to see Dr. Leckie. Dr. Leckie took Claimant off work and faxed the report to Employer. After the doctor visit, Claimant spoke with Mr. Sanford about the accident. (Tr. 80-81, 146-147).

Claimant explained the circumstances of the accident to Dr. Leckie. He recalled experiencing pain in his neck and shoulder area, his upper back and lower back, and his right knee. In the morning following the accident, Claimant's entire left arm was numb and his "middle finger, the ring finger, and the pinky finger" on his left hand had "curled up." (Tr. 81-82). Claimant reported his finger problems to his physicians. (Tr. 149).

Dr. Leckie took x-rays of Claimant, but did not indicate whether or not the x-rays were "normal."<sup>13</sup> (Tr. 147).

Claimant did not return to work for Employer for several months. Dr. Leckie referred Claimant to Dr. Haimson, an orthopedist. Dr. Haimson treated Claimant for several months and prescribed medication and physical therapy. (Tr. 83). Claimant also was examined once by Dr. Po at Employer's request. Dr. Po performed an examination that included "a lot of

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<sup>12</sup> On cross-examination it became unclear whether Claimant attempted to phone Employer's main office or tried to call Mr. Sanford's pager number. He first testified that he called Mr. Sanford's pager number. Claimant then stated it was the office number provided by Mr. Sanford. Eventually, Claimant stated he called "the office itself" and received no answer at the number he dialed. Claimant further testified he did not have Mr. Sanford's cellular phone number, home phone number, or pager number. (Tr. 144-145).

<sup>13</sup> Claimant's testimony does not identify the kind of x-rays that were taken, nor does it set forth a time frame in which the x-rays were performed.

measurements" and an x-ray. (Tr. 82). Dr. Po opined Claimant could return to light duty work subject to restrictions. Dr. Haimson agreed Claimant could return to light duty work with restrictions. (Tr. 83).

Claimant testified that Dr. Haimson ordered an MRI of his shoulder, a nerve conduction study, and an EMG.<sup>14</sup> Claimant recalled Dr. Haimson indicating the MRI was "negative." (Tr. 147-148).

After Dr. Haimson released Claimant to work, he received a notice from Employer to report to work.<sup>15</sup> (Tr. 84, CX-10, p. 2). Claimant did not believe he could have performed his regular job duties with the restrictions assigned by Dr. Haimson. Specifically, he did not believe he could climb ladders or get on and off barges and boats. Additionally, Claimant testified he could not perform temperature probes because the activity required overhead use of his arms and hands, as well as use of an instrument that weighed more than five pounds. (Tr. 86-87).

Claimant reported to Employer at 9:00 AM on May 1, 2003, with the intention of trying to perform the work. (Tr. 88). He met with Mr. Sanford and Mr. Serie, Claimant received his equipment, and was told he would be performing his pre-injury job of surveying barges. (Tr. 88, 90, 154-155). He understood that he would work with another employee for a few weeks and then would return to performing his regular job alone. (Tr. 90, 92). Claimant was to report to work on the night of May 1, 2003 to work his normal shift from 7:00 PM to 7:00 AM. Claimant returned to his home in Natchez, Mississippi to await the telephone call regarding his assignment. (Tr. 89-90).

In the afternoon of May 1, 2003, Mr. Sanford telephoned Claimant and informed him that his employment was terminated because Employer had "no position" for him. (Tr. 89, 92, 155). Claimant testified that Mr. Sanford did not give a reason for the termination and asked him to return his equipment. (Tr. 94-95, 158).

Claimant testified he received a phone call and a follow-up letter notifying him that his workers' compensation benefits would be suspended due to his termination and that he would not

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<sup>14</sup> Claimant's testimony does not indicate when these tests were ordered or performed.

<sup>15</sup> In a letter from Employer dated April 25, 2003, Claimant was instructed to return to work on Thursday, May 1, 2003, at "9:00." (Tr. 85, CX-10, p. 2).

be able to see a doctor because his health benefits would cease as well.<sup>16</sup> (Tr. 93).

Claimant's unemployment compensation was his only source of income after his termination. (Tr. 95). Since the "end of June, early July" 2004, Claimant attempted to earn income by working for Mike's Wholesale Tires (Mike's) on an "as-needed basis." He earned \$6.00 per hour. At the time of formal hearing, Claimant had earned a total of \$1,080.00 for his work with Mike's. (Tr. 96-97, 106-107). Claimant testified at formal hearing that he is paid with a "paycheck" from which his employer "takes some taxes out." (Tr. 107). However, he testified at his deposition that he was "paid cash." (Tr. 108). Claimant testified at formal hearing that "to [Claimant] paying cash is when they don't take taxes out and he gives me a check." (Tr. 108).

Claimant testified that Mike's is a road call service and he would deliver "parts" to his employer at a jobsite. (Tr. 96). The "parts" included alternators, brake shoes, carburetors, governors, brake drums, or any other material his employer requested. Claimant did not have a problem carrying the materials. (Tr. 108-109). Claimant has not held any other job since his termination by Employer. (Tr. 109).

Claimant began treatment with Dr. Fleet, a neurologist in Mobile, Alabama, in early 2004. (Tr. 97-98). At the time of formal hearing, Claimant was continuing his treatment with Dr. Fleet. Dr. Fleet had scheduled "a test" for the Tuesday prior to formal hearing and Claimant received a prescription for a wrist splint for his left hand. (Tr. 99, 100). Claimant had a bone scan scheduled for the morning after formal hearing and had an appointment with Dr. Fleet scheduled for November 10, 2004. (Tr. 99, 101). At the time of hearing, no doctors had indicated that surgery was necessary for any of Claimant's injuries. (Tr. 149-150).

At formal hearing, Claimant stated that Dr. Fleet "kept him off work until the present time." He stated he told Dr. Fleet that he needed to make money. However, Dr. Fleet maintained that Claimant should not be working. According to Claimant, Dr. Fleet also instructed Claimant not to "overexert" himself and to avoid lifting over 5 pounds with his left arm. (Tr. 101, 150).

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<sup>16</sup> At the time of formal hearing, Claimant did not have a copy of the letter nor did he have anything in writing regarding the cancellation of his medical benefits. (Tr. 93, 155-156).

At his deposition, Claimant testified he had not discussed work at Mike's with Dr. Fleet. Claimant testified that he was not aware of any restrictions at the time of his deposition. He further testified that Dr. Fleet had not indicated whether or not he could work. (Tr. 150-151).

At formal hearing, Claimant indicated that he discussed work restrictions with Dr. Fleet after his deposition and before formal hearing. (Tr. 150-151). He identified a report from Dr. Fleet dated February 26, 2004, in which Dr. Fleet indicated Claimant was unable to work "pending next OV the twenty-third of March '04." (Tr. 170; CX-20, p. 9). Claimant did not return to work after receiving the work slip. At the time he received the slip, Claimant informed Dr. Fleet that he did not want "to be always off work." He indicated that he had forgotten about the discussion during his deposition. (Tr. 171).

Claimant had not received any compensation for the alleged injury since April 30, 2003.<sup>17</sup> (Tr. 104). Claimant testified that he received unemployment benefits from the State of Louisiana. He testified that he was truthful on the unemployment application. He indicated that he was capable of working because he believed he could perform "light duty work." (Tr. 109-110, 162).

Claimant was a construction superintendent for Valley Builders from March 2002 through June 2002. His job duties included managing a crew and responsibility for paperwork, signing bills, and receiving shipments on the jobsite. Claimant's earnings of \$8,081.00 for his work with Valley Builders were reflected in his payroll records and in the Social Security Administration (SSA) records. (Tr. 110-111; EX-5, p. 1; EX-7, p. 2). Claimant's SSA records also list \$5,888.25 as his total wages during his ten weeks of employment with Employer. (Tr. 112; EX-7, p. 2). Claimant did not have any other record of income during the period of July 18, 2001 through July 18, 2002, because he did not report any other income and did not pay taxes on any other income. (Tr. 112-113).

Claimant also worked as a bail bondsman before working for Employer. He was part owner of a company called "Freedom Bail Bonds." (Tr. 113). During his deposition, Claimant agreed that

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<sup>17</sup> Claimant filled out a U.S. mail card regarding his change of address when he moved from Natchez, Mississippi, to Gulfport, Mississippi, but he did not directly inform Employer/Carrier. (Tr. 156).

he performed the "paperwork part" of the business. On cross-examination at hearing, Claimant agreed that he was responsible for bookkeeping, but denied responsibility for payroll. (Tr. 113-114). At his deposition, Claimant also testified that he worked with "law enforcement and the court system" to get bonds in place. He was also responsible for getting bond money from "whoever was going to pay for that." Additionally, Claimant agreed that his responsibilities included running the office and supervising employees. (Tr. 114-115).

Claimant admitted to being convicted of the felony of "conspiracy to distribute marijuana" in 1998. (Tr. 117-118). At the time of formal hearing, Claimant remained on parole for the conviction. (Tr. 118).

Claimant drove approximately twenty-five miles from his home in McHenry, Mississippi, to the formal hearing. He was able to drive approximately two hours from his home to Mandeville, Louisiana, for his deposition. He testified that he "stopped a couple of times and stretched" during the drive to his deposition. (Tr. 152-153). Claimant is able to perform daily living activities. He testified that he renewed his hunting license in 2003 because the proceeds are used to "benefit disabled veterans and disabled people." (Tr. 153-154; 168).

**Charles Sanford, Jr.**

Mr. Sanford testified at formal hearing. He is the assistant manager of Employer's "Gulf Division." His office is located in St. Rose, Louisiana. (Tr. 175).

Mr. Sanford had experience working as a barge surveyor and actually "drafted barges and performed surveying operations" at locations other than the Exxon-Mobil facility. However, he testified to being present at the Exxon-Mobile facility to monitor Employer's surveyors as they survey barges. (Tr. 176).

AIMCOR is Exxon-Mobil's representative in running the Baton Rouge facility. It has a contract with Exxon-Mobil to operate the barge loading facility. (Tr. 176-177). AIMCOR was responsible for establishing policies regarding access to the Exxon-Mobile dock and conduct on the dock. Mr. Rusche was Mr. Sanford's contact at AIMCOR. (Tr. 177).

Mr. Sanford described a temperature probe as a 12-foot piece of stainless steel that is approximately one-eighth to

one-quarter of an inch in width. (Tr. 178-179). He testified that the probe is pushed into loose material and indicated that it may need to be moved "a little bit" if a surveyor finds resistance or a larger piece of coal. (Tr. 178). Mr. Sanford testified the temperature probe can be held with one hand and estimated it weighs between five and ten pounds.<sup>18</sup> (Tr. 178-179).

Mr. Sanford testified that a surveyor could work a shift from 7:00 PM to 7:00 AM, during which the surveyor would be "on call" for the 12-hour period. The surveyor may not be at a facility for the duration of the 12-hour shift and may leave the facility once he completes his assignment. (Tr. 180).

In June 2002, Claimant was hired to work primarily in the Baton Rouge location. When he returned to work after the injury, Claimant was to continue working at the AIMCOR facility in Baton Rouge and Employer did not plan to have him work at other locations. (Tr. 181).

On the morning of September 18, 2002, Claimant informed Mr. Sanford that he had tripped while surveying a barge and "grabbed the bowline and pulled his shoulder." Mr. Sanford testified that Claimant did not mention being suspended over the water and he did not doubt that an accident occurred based on the Claimant's initial report. (Tr. 181). However, Mr. Sanford was under the impression that Claimant "tripped and was able to grab a line to stop from falling into the water." He was not aware that Claimant had fallen off the barge.<sup>19</sup> (Tr. 183-184, 198).

Mr. Sanford did not believe Claimant attempted to contact Employer in the hours after the alleged accident. According to Mr. Sanford, Claimant had his home phone number, his cellular phone number, and his pager number. Additionally, a phone call to the "main office" would have been forwarded to an answering service. Mr. Sanford did not receive a page on the night of the alleged accident. (Tr. 182).

Employer's human resources department contacted Mr. Sanford's office when Claimant was released to return to work in 2003. (Tr. 183-184). Employer attempted to place Claimant back

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<sup>18</sup> While testifying, Mr. Sanford demonstrated pushing the temperature probe into the coals. In doing so, Mr. Sanford used both hands. (Tr. 197).

<sup>19</sup> The accident report stated Claimant was "measuring a barge, slipped, and caught himself on the loose bowline." (Tr. 202, CX-3, p. 1).

at work within his doctors' restrictions.<sup>20</sup> (Tr. 185; EX-3, pp. 4-5). A "Job Functions Capabilities Form" described Claimant's job duties and the physical demands of a surveyor as follows: lifting of no greater than five pounds; frequent standing, walking, bending, and reaching; and infrequent climbing, sitting, and kneeling. (Tr. 186; CX-9, p. 1). Mr. Sanford believed the job description fell within the restrictions assigned by Claimant's doctors. (Tr. 187).

Employer decided Claimant would assist another surveyor during the first few weeks of his return to work because Claimant had not worked for "quite a long time." (Tr. 187).

Prior May 2003, Mr. Sanford had not received any indication from anyone at AIMCOR that Claimant would not be allowed to return to the facility. (Tr. 190). When he notified Mr. Rusche that Claimant would return to work at the Exxon-Mobil facility, Mr. Rusche would not allow Claimant to return to the facility. Mr. Rusche cited Claimant's "excessive phone use" and his bringing unauthorized persons on the facility. (Tr. 188-189; EX-6, p. 1).

Prior to Claimant's alleged accident, Mr. Rusche informed Mr. Sanford that AIMCOR's phone bills reflected many calls to Natchez, Mississippi. (Tr. 190). Mr. Rusche also informed Mr. Sanford that Claimant brought unauthorized persons onto the premises. (Tr. 193). Mr. Sanford confronted Claimant about the unauthorized phone calls, which Claimant was willing to reimburse.<sup>21</sup> (Tr. 190). Despite Mr. Rusche's complaints, Mr. Sanford testified he was not aware that Claimant would be denied authorization to return to the AIMCOR facility until May 2003. (Tr. 194, 208). Mr. Sanford did not ever learn that AIMCOR had more serious allegations of Claimant bringing prostitutes onto the premises. (Tr. 194).

Employer did not have another job for Claimant once he was denied access to the AIMCOR facility. Consequently, Claimant's employment was terminated. Mr. Sanford stated that Claimant's workers' compensation claim and his medical benefits did not play any role in his termination. (Tr. 195). The "Employee Information Worksheet" stated Claimant was terminated involuntarily "per customer's request." (Tr. 195-196).

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<sup>20</sup> Mr. Sanford did not know which doctors authorized Claimant to return to work and assigned restrictions. (Tr. 204).

<sup>21</sup> Mr. Rusche sent Employer an invoice demanding payment for "excessive phone charges." However, the invoice referenced phone calls beginning on May 1, 2002. Employer hired Claimant in July 2002. (Tr. 191).

According to Mr. Sanford, Claimant was terminated because there were no available jobs that he could perform "in the condition that he was released to return to work in;" the termination was not due to Claimant's improper conduct. (Tr. 205-206).

On cross-examination, Mr. Sanford testified that six or seven surveyor positions were "operating out of" his office. Employer did not have another job available for Claimant that complied with his work restrictions.<sup>22</sup> (Tr. 205).

**Kevin Toussaint<sup>23</sup>**

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<sup>22</sup> According to Mr. Sanford, the job at the Exxon-Mobil dock fit within Claimant's restrictions because the "barges were positioned." The barges at the Exxon-Mobil dock were easier to access than the barges at other locations and the surveyors worked under different conditions. (Tr. 207).

<sup>23</sup> Claimant filed a motion to exclude the post-hearing deposition of Mr. Toussaint, citing an intentional violation of the Court's sequestration order by Employer's counsel. Claimant argues Employer's counsel reviewed Claimant's testimony with Mr. Toussaint prior to Mr. Toussaint's deposition. Claimant argues that the review resulted in a significant and material change in Mr. Toussaint's testimony; namely, during the post-hearing deposition Mr. Toussaint recalled seeing Claimant with a flashlight while the co-workers performed their independent assignments on September 18, 2002. According to Mr. Toussaint, he recalled seeing Claimant with the flashlight after "the question came up about whether or not he had a flashlight." Mr. Toussaint stated that he recalled the incident "after the lawyer said that [Claimant] said he didn't have a flashlight . . ." Employer contends it did not violate the sequestration order and posed the same questions during the deposition as it would have posed at formal hearing. After reviewing the deposition testimony, I note that Employer's counsel specifically questioned Mr. Toussaint regarding Claimant's use of a flashlight and Claimant's testimony that he loaned a flashlight to Mr. Toussaint. The testimony is unclear as to whether Employer's counsel discussed this matter with Mr. Toussaint prior to his deposition or whether Mr. Toussaint first learned of Claimant's testimony during direct examination by counsel. Claimant requests that the complete post-hearing deposition of Mr. Toussaint be stricken, citing U.S. v. Blasco, 702 F.2d 1315 (11<sup>th</sup> Cir. 1983), for the proposition that the Court may strike testimony where a party suffers prejudice and there has been connivance by counsel or the witness in intentionally violating the sequestration rule. Given the uncertainty of the circumstances surrounding the change in Mr. Toussaint's testimony, I decline to invoke such a harsh penalty as it is unclear whether the sequestration order was actually violated, much less intentionally violated by the actions of Employer's counsel. Further, I find Claimant has not shown how he was prejudiced by the change in Mr. Toussaint's testimony. Consequently, I deny Claimant's motion to exclude Mr. Toussaint's deposition in its entirety. However, Claimant's objection is noted and the discrepancies in Mr. Toussaint's testimony will be considered when weighing his credibility as a witness. See U.S. v. Binetti, 547 F.2d 265 (5<sup>th</sup> Cir. 1977) (After the defense violated the sequestration rule, the Court had discretionary power to instruct the jury to weigh the credibility of the defendant's witnesses.).

Mr. Toussaint's deposition testimony was taken by the parties on November 11, 2004. (EX-23). Mr. Toussaint had been employed by Employer as a surveyor since August 2002. He performed his job duties at the "Exxon Chemical Plant" on the "Amaco docks" in Baton Rouge.<sup>24</sup> (EX-23, p. 7).

As a surveyor, Mr. Toussaint's job duties included "inspection and surveying, drafting" of empty and loaded barges. (EX-23, pp. 8-9). Mr. Toussaint testified that his surveying equipment included drafting tape, a drafting pad, a pen, a "crayon" for marking on the barges, a hard hat, safety glasses, a life jacket, and steel-toed boots. (EX-23, pp. 9-10). When performing inspections at night, Mr. Toussaint was able to see due to spotlights on the docks and by using a handheld flashlight. (EX-23, p. 9). Mr. Toussaint recalled seeing Claimant with a hand-held flashlight on the night of the alleged accident. He disagreed with the statement that Claimant did not have a flashlight. (EX-23, p. 19).

Mr. Toussaint received "on-the job" training for Claimant, which initially required him to "shadow" Claimant. (EX-23, pp. 8, 10). On the evening of the alleged accident, Mr. Toussaint and Claimant were "on call" from 7:00 PM until 7:00 AM. Mr. Toussaint testified that he worked on his own for the early part of the shift, but finished the shift with Claimant. (EX-23, p. 11). Mr. Toussaint performed the "starboard tank readings and the stern tank readings." Claimant took measurements on the port side and the bow side of the barge. (EX-23, p. 12).

According to Mr. Toussaint, Claimant "started the barge" before he arrived. Mr. Toussaint began taking tank readings on the starboard side of the barge and worked his way "down and around to the stern side." He did not meet Claimant until the end of the inspection, but he "glanced at [Claimant]" for "a second or two." (EX-23, p. 32). During his October 14, 2004 deposition, Mr. Toussaint testified that he saw Claimant "when he started off" and did not see Claimant again until Claimant was "coming back to the starboard side where [Mr. Toussaint] had first seen him." (EX-23, p. 34; Deposition exhibit pp. 22-23). During the instant deposition, Mr. Toussaint recalled that he glanced at Claimant while working.<sup>25</sup> (EX-23, p. 34).

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<sup>24</sup> When Mr. Toussaint was hired, three barge surveyors performed some of their duties at the facility in Baton Rouge. At the time of his deposition, two barge surveyors worked at the Baton Rouge location. (EX-23, p. 31).

<sup>25</sup> Mr. Toussaint only recalled glancing at Claimant after Counsel for Employer reviewed Claimant's testimony with him and he was asked by Employer's counsel whether he had a recollection regarding the flashlight. (EX-23, pp. 46).

Mr. Toussaint did not recall any other barges directly in front of or behind the barge on which they were working, although he agreed that it was possible that there were other barges in front of the barge in question. (EX-23, pp. 13, 43). He agreed that he was able to see and hear Claimant "on occasion" while they worked on different parts of the same barge. (EX-23, pp. 13-14).

He believed he would have seen Claimant fall over the barge and grab onto the bow line. He also believed the tugboat operator would have witnessed such an event. (EX-23, pp. 23-24). However, in his previous deposition, Mr. Toussaint testified that he could not see the front of the barge while taking readings on the stern of the barge. (EX-23, p. 41). Nonetheless, he indicated that he would have seen Claimant fall off the barge on the "port bow," but would not have seen the accident if it occurred on the "bow part" or "toward the middle of the bow." (EX-23, pp. 44-45; 50). Mr. Toussaint testified that he was "moving" and Claimant was moving; whether he would have been able to see the alleged accident would depend on where the accident occurred and where Mr. Toussaint was stationed at that time. (EX-23, p. 51).

Mr. Toussaint believed he would have heard Claimant "holler for help or scream" because they would have been no more than one hundred feet apart and because it is quiet on the barges at night. (EX-23, pp. 24-25). Mr. Toussaint further agreed that a surveyor would have lost some of his equipment in an accident as described by Claimant. (EX-23, p. 25).

After performing their job tasks, Mr. Toussaint and Claimant met and Claimant stated that he "hit his shoulder on one of the top knuckles and that he almost fell in the water." According to Mr. Toussaint, Claimant stated he grabbed a "knuckle" to stop himself from going into the water. (EX-23, pp. 14-15, 41). Mr. Toussaint testified that Claimant stated he injured himself on a knuckle on the "port bow side" of the barge. (EX-23, p. 18). Claimant reported he injured his shoulder and did not complain of neck, back, knee, or finger pain. (EX-23, p. 15).

Mr. Toussaint observed Claimant "taking his shoulder and . . . favoring that it was hurt." He observed Claimant "taking his shoulder in a circular motion" and using his other hand to rub the shoulder. Mr. Toussaint could not recall which shoulder was injured. (EX-23, p. 42).

Mr. Toussaint testified he would have expected a person to be "a little bit more nervous or a little bit more scared" after almost falling into the water. (EX-23, p. 17). He testified Claimant planned to stay and talk with "the fellows on the dock" for a while after leaving the barge. Claimant did not state whether he was going to report the injury. (EX-23, p. 19).

When Mr. Toussaint began working for Employer, he was instructed to contact his supervisor in the event of an injury. He was given a paper with the office phone number, contact numbers for Mr. Sanford, and contact numbers for Mr. Seria.<sup>26</sup> According to Mr. Toussaint, the office would direct an employee to the appropriate contact person. (EX-23, p. 21). Mr. Toussaint testified that Claimant called Mr. Sanford a few nights before the alleged accident to discuss a barge; he believed Claimant called Mr. Sanford at his home. (EX-23, p. 22).

Mr. Toussaint disagreed with the contention that Claimant was not in possession of his supervisors' phone numbers or Employer's office phone number. (EX-23, p. 22). However, he was not present when Claimant tried to telephone Mr. Sanford. (EX-23, p. 44).

Mr. Toussaint did not recall noticing any ropes or bow lines in the area of the barge on which Claimant was allegedly injured. Mr. Toussaint further did not recall Claimant stating that he injured his shoulder on a rope. (EX-23, p. 23).

Mr. Toussaint filled out a "Barge Inspection" form dated September 17, 2002 in which he indicated the barge was "free of materials and previous cargo" and that "it was pretty much safe working conditions." (EX-23, p. 26). He filled out the form based on the information Claimant had given him at the end of the surveying job. (EX-23, p. 27). Mr. Toussaint did not recall the barge being slippery on the night of Claimant's alleged accident. (EX-23, p. 28).

### **Joel Rusche**

Mr. Rusche was deposed by the parties on October 27, 2004. Mr. Rusche was employed in Texas by Oxbow Carbon and Minerals, which "bought out" AIMCOR at the end of 2003 or beginning of

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<sup>26</sup> The contact numbers for Mr. Sanford and Mr. Seria included their respective home phone numbers, cell phone numbers, and pager numbers. (EX-23, p. 21).

2004. (EX-20, p. 5). While working at the Baton Rouge location, Mr. Rusche performed his job duties at the "coker dock" terminal which was owned by Exxon-Mobil.<sup>27</sup> (EX-20, p. 7). Mr. Rusche supervised 21 AIMCOR employees at the Baton Rouge facility. (EX-20, p. 9).

At the Exxon-Mobil dock, the AIMCOR employees controlled dock access and "administer[ed] the facility."<sup>28</sup> (EX-20, pp. 10-11, 57). Mr. Rusche supplied personnel with the "code" to open the facility gate. He testified there were no written regulations regarding who had the right to access the dock area. (EX-20, p. 11).

AIMCOR was responsible for cleaning the decks of the barges. (EX-20, p. 15). Mr. Rusche testified that the decks were kept clean to prevent the "product" from going into the water and agreed that there were safety considerations due to the slippery nature of shot coke. (EX-20, p. 16).

As far as Mr. Rusche understood, Employer's employees were to be on call during their shift to survey a barge and were to leave the premises after completing their assignments. (EX-20, p. 14). Mr. Rusche regularly communicated with Employer's workers to have them come to the facility and to discuss problems with the barges. (EX-20, pp. 14-15, 16). Mr. Rusche did not supervise Employer's personnel and he was not familiar with a written agreement between AIMCOR and Employer regarding Employer's responsibilities at the Exxon-Mobil facility. (EX-20, pp. 12, 18).

Mr. Rusche was not aware of any written procedure for handling problems between AIMCOR and Employer's workers. (EX-20, p. 21). He would first address the problem with the surveyor and then would attempt to resolve the issue by speaking with Mr. Sanford.<sup>29</sup> If the problems continued to occur, Mr. Rusche would again contact Mr. Sanford and inform him that the employee was no longer needed. (EX-20, p. 20).

Mr. Rusche testified that Claimant would remain on the premises all day or night and use the phone in the maintenance

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<sup>27</sup> A "customer and service provider" relationship existed between Exxon-Mobil and AIMCOR, as well as between Exxon-Mobil and Employer. (EX-20, p.57).

<sup>28</sup> Mr. Rusche testified that only employees, contractors, and vendors are allowed on site, pursuant to AIMCOR's policy. (EX-20, pp. 10, 57-58).

<sup>29</sup> Mr. Rusche indicated that problems were usually resolved after he spoke with the employee in question, except for problems involving Claimant. (EX-20, pp. 19-21).

office for "very lengthy periods of time." (EX-20, pp. 21-22). Other employees informed Mr. Rusche that Claimant brought unauthorized women onto the premises at night. Mr. Rusche saw Claimant in the area of the maintenance office and advised him "numerous" times to leave the area after completing an assignment. (EX-20, p. 22). The rail operators and bargemen also informed Mr. Rusche that Claimant "stuck around" in the maintenance office and used the phone.<sup>30</sup> (EX-20, p. 22).

Three AIMCOR telephone lines were accessible by Employer's personnel and AIMCOR employees. The phone lines were accessible from Mr. Rusche's office, the maintenance office, at the barge dock, and at the rail building. (EX-20, pp. 24-25, 27). Mr. Rusche testified that the maintenance office "was open" and that persons besides AIMCOR employees and Employer's workers had access to the phone lines. (EX-20, p. 25). There were no written regulations regarding the use of the phone lines by Employer's personnel. (EX-20, p. 27).

Mr. Rusche never heard Claimant actually make an unauthorized phone call, although he saw Claimant on the phone "all the time." (EX-20, pp. 32, 59). An employee named Chad Carney informed Mr. Rusche that Claimant had called Florida. (EX-20, p. 31). Mr. Rusche testified that he called the Florida phone number appearing on the phone bill and that the woman who answered stated she knew Claimant.<sup>31</sup> (EX-20, p. 32).

Mr. Rusche considered Claimant's unauthorized phone use to be a "continuing problem," but could not provide an exact date of when it first came to his attention. (EX-20, p. 30). However, he testified that he realized the unauthorized phone use was a problem when he received a \$400.00 phone bill from AIMCOR's main office in Texas City, Texas. (EX-20, p. 28). Mr. Rusche testified that he had asked Claimant to stop using the office phone "a hundred times" prior to his receipt of the phone bill.<sup>32</sup> (EX-20, p. 30).

Mr. Rusche received phone bills covering the period of August 25, 2002 through October 25, 2002. (EX-20, pp. 35-36;

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<sup>30</sup> Mr. Rusche identified several individuals under his supervision who reported Claimant's inappropriate use of the office telephone. (EX-20, p. 23-24).

<sup>31</sup> Mr. Rusche asked the woman if she knew Claimant, but did not ask her name or whether Claimant had called her. (EX-20, pp. 32-33, 60). He did not recall the actual phone number that he called. (EX-20, pp. 32-33).

<sup>32</sup> When told to stop using the telephone, Claimant would laugh and thought Mr. Rusche was joking. Claimant would leave the facility when asked. (EX-20, p. 31).

EX-6, pp. 3-16). However, Mr. Rusche pointed to a 21-minute phone charge dated August 14, 2002 on the bills in question, which he believed to be a phone call to Claimant's home or to the home of Claimant's girlfriend. (EX-20, p. 36). An AIMCOR invoice dated October 1, 2002, charged \$597.19 for phone calls made to Natchez, Mississippi from May 1, 2002 through September 16, 2002. (EX-20, pp. 37-38; EX-6, p. 2). Mr. Rusche could not recall why May 1, 2002, was the beginning date of the invoice, but he testified that he had "more bills than just this one or these two." (EX-20, p. 39). The specific charges which he attributes to Claimant occurred between August 14, 2002 and September 2002. (EX-20, p. 59).

On the bills, Mr. Rusche indicated that "the total so far is \$404.01." He further indicated that he could not prove whether other calls to Natchez, Mississippi, were due to Claimant's telephone use.<sup>33</sup> (EX-20, p. 41; EX-6, p. 3). He indicated that AIMCOR employees would have to use the AIMCOR phone lines to call Claimant's home regarding barge inspections; although there was not a set time limit for the phone calls, Mr. Rusche testified the calls should not have been lengthy.<sup>34</sup> (EX-20, pp. 42-43).

After Mr. Rusche received the phone bill from AIMCOR's main office, he explained the situation to Phil Griffith, his boss. (EX-20, pp. 33-34; EX-6). Mr. Rusche notified Mr. Sanford of the events. (EX-20, p. 34). Mr. Rusche told Mr. Sanford that he had spoken to Claimant and Mr. Serie about the situation. Around September 30, 2002, Mr. Rusche told Mr. Sanford that he did not want Claimant returning to the facility. (EX-20, p. 45). Mr. Sanford tried to convince Mr. Rusche to allow Claimant to continue working at the facility because Employer was "shorthanded." However, Mr. Rusche did not agree to the request. (EX-20, p. 45, 67-68). After a few weeks of discussion, Mr. Rusche believed it was "official" that Claimant was not to return to the facility.<sup>35</sup> (EX-20, p. 46).

Two employees notified Mr. Rusche that Claimant brought prostitutes to the work site. (EX-20, p. 47). Mr. Rusche

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<sup>33</sup> Mr. Rusche indicated there were other employees who lived in Natchez, Mississippi, who might have made some of the phone calls. (EX-20, p. 42).

<sup>34</sup> The phone bills contained a notation by Mr. Rusche that indicated some of the calls "for a couple of minutes" might have been calls from AIMCOR to Claimant. (EX-20, p. 44; EX-6, p. 10).

<sup>35</sup> Mr. Rusche testified he sent "written communications" in 2002 to Mr. Sanford and Mr. Serie which stated Claimant was no longer allowed on the premises. (EX-20, p. 51). The "written communications" are not contained in the record.

stated that he does not "know for certain if there were women out there;" however, he testified the other employees had no reason to lie about the situation.<sup>36</sup> (EX-20, p. 48).

Mr. Rusche asked Claimant if he had "brought any whores" onto the premises and Claimant denied doing so. (EX-20, pp. 48-49). Mr. Rusche, Mr. Sanford, and Mr. Serie also discussed the allegation that Claimant had brought prostitutes to the work site. Mr. Rusche understood that Claimant would not be returning to work at the dock. (EX-20, p. 48).

Mr. Rusche did not hear about Claimant's injury until after he had "barred" Claimant from the AIMCOR facility.<sup>37</sup> (EX-20, p. 49). He indicated that Mr. Sanford phoned him regarding Claimant's doctor release and asked if Claimant could return to the dock. (EX-20, p. 50). He did not recall receiving information about the injury from his employees. (EX-20, p. 50). He could not recall the time period within which he learned of the injury, but he was contacted by Mr. Sanford regarding Claimant's return to work in May 2003. (EX-20, p. 50; EX-6, p. 1).

On May 2, 2003, Mr. Rusche e-mailed a "formal letter" to Mr. Sanford denying Claimant's return to the AIMCOR facility.<sup>38</sup> (EX-20, p. 51; EX-6, p. 1). Mr. Rusche objected to Claimant's return due to the unauthorized phone calls and the unauthorized personnel issue. (EX-20, pp. 68-69). Mr. Rusche did not know the status of Claimant's employment with Employer after the May 2, 2003 e-mail. (EX-20, p. 53).

Mr. Rusche testified Employer wanted Claimant to work at the AIMCOR facility because it was a "light duty type atmosphere." Claimant would not have to perform heavy lifting or perform any "strenuous" activity. Mr. Rusche and Mr. Sanford did not discuss whether Claimant would return to his "regular duties." (EX-20, p. 53).

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<sup>36</sup> The alleged incident occurred at night and Mr. Rusche was not present at the facility when it occurred. (EX-20, p. 60). He did not provide a date on which the alleged incident occurred or a date on which he confronted Claimant. He testified that prostitution was "very prevalent" in the area of Baton Rouge where the facility is located. (EX-20, p. 61).

<sup>37</sup> Mr. Rusche testified he was not actually present at the AIMCOR facility when the alleged accident occurred. (EX-20, p. 64).

<sup>38</sup> Mr. Rusche testified that he spoke with Mr. Sanford on the morning of May 2, 2003, regarding Claimant's return to the AIMCOR facility and he sent the follow-up e-mail on the same date. (EX-20, pp. 53, 65). However, he conceded that the discussion could have taken place on the day before. (EX-20, p. 73).

Mr. Rusche had never requested that any of Employer's other employees not return to the AIMCOR facility. On May 2, 2003, Employer had three employees working regularly at the AIMCOR facility. (EX-20, p. 54). He testified there was no written agreement between AIMCOR and Employer which would allow him to refuse to accept an employee at the Exxon-Mobil dock. However, he discussed the matter with his boss, Mr. Griffith, who authorized Mr. Rusche to make the decision. (EX-20, p. 55).

Mr. Rusche did not inform Claimant that he was barred from returning to the AIMCOR facility. (EX-20, p. 65). Mr. Rusche did not have the ability to hire or fire Employer's personnel and played no role in Employer's personnel decisions. (EX-20, p. 68).

Mr. Rusche did not request or review any of Claimant's medical records or return to work forms. (EX-20, p. 69). Mr. Rusche was not influenced by Claimant's injuries, his workers' compensation claim, or his alleged work-related accident. (EX-20, p. 70). He believed Mr. Sanford sincerely wanted Claimant to return to work at the AIMCOR facility in October 2002 and May 2003. (EX-20, p. 69).

## **The Medical Evidence**

### **Dr. Charles Leckie**

Dr. Leckie's credentials are not of record. On September 18, 2002, Claimant presented to Dr. Leckie with pain in his left arm radiating into his neck. Claimant reported that the pain began 11 to 12 hours prior to the visit after he fell while surveying a barge. Claimant reported holding onto a rope with his left arm. He complained of numbness and pain into his arm and "4<sup>th</sup> and 5<sup>th</sup> fingers." (CX-13, p. 1).

A physical exam revealed a decreased range of motion in "left shoulder abduction and external rotation," as well as "pain with range of motion" in Claimant's left shoulder. Dr. Leckie ordered shoulder x-rays. (CX-13, p. 2).

On October 1, 2002, Claimant continued to complain of numbness and shoulder pain. Dr. Leckie noted the shoulder x-rays were negative. (CX-13, p. 4). Physical examination revealed essentially no change, although Dr. Leckie noted a slight increase in range of motion. Claimant was referred to Dr. Haimson for a shoulder pain consult. (CX-13, p. 5).

Throughout February 2003, Claimant was seen by Dr. Leckie on four occasions, primarily for treatment of his diabetes.<sup>39</sup> Dr. Leckie noted continuing complaints of "shoulder pain." Physical examinations of Claimant's shoulder continued to reveal decreased range of motion and pain with range of motion. (CX-13, pp. 6-15).

On March 19, 2003, Claimant again presented to Dr. Leckie with complaints of shoulder pain. Dr. Leckie noted Claimant had not been treated by Dr. Haimson for two months. He noted that Claimant's physical therapy had been stopped after Claimant received a second opinion from Dr. Po. Claimant continued to experience left shoulder pain and indicated his entire arm was numb. Claimant also complained of insomnia, short memory, and being "grouchy." (CX-13, p. 15). There was no change in Claimant's physical examination. Dr. Leckie recommended Claimant continue treatment with Dr. Haimson and continue physical therapy. (CX-13, p. 16).

#### **Dr. Robert Haimson**

Dr. Haimson, a board-certified orthopedic surgeon, was deposed by the parties on October 29, 2004. (EX-13, pp. 4-5). On October 7, 2002, Claimant described sustaining an injury when he slipped and fell at work on September 18, 2002. He described catching himself on a boat line and dangling from his arm. (EX-13, pp. 6-7; CX-14, p. 6). Claimant experienced pain in his left shoulder, along with a "popping sensation." He reported paresthesia in his hand and lower back pain. Claimant denied any prior injury to his upper left extremity. (EX-13, p. 7; CX-14, p. 6).

Dr. Haimson reviewed a left shoulder x-ray dated September 26, 2002. The x-ray revealed no fracture, no dislocation, and no separation of the shoulder. (EX-13, p. 8; CX-14, pp. 6, 16; CX-19, p. 1). On physical examination, Claimant presented with a normal neck exam with tenderness around his shoulder. Dr. Haimson found limited movement of Claimant's upper extremity due to pain, along with a loss of shoulder strength which he attributed to poor effort due to pain. Claimant's neurological exam was normal. (EX-13, p. 9; CX-14, p. 6).

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<sup>39</sup> The February 10, 2003 medical report indicates Claimant was hospitalized on the previous night. (CX-13, p. 6). The medical records from the Natchez Regional Medical Center, relating to that hospitalization, are included in Employer's Exhibit No. 17.

Dr. Haimson diagnosed Claimant with a strain and/or sprain of his shoulder with a possible "stretch" to his nerves across the shoulder region. He ordered an MRI and recommended treatment with heat, stretching, and anti-inflammatory medication. He also diagnosed Claimant with a "painful low back." (EX-13, p. 10; CX-14, p. 6). Claimant was placed off work until further notice. (EX-13, p. 11).

On October 17, 2002, Dr. Haimson reviewed Claimant's October 15, 2002 MRI, which reflected normal results and confirmed his diagnosis of a shoulder strain/sprain. (EX-13, p. 14; EX-16; CX-14, pp. 6, 14). He opined Claimant would not likely need surgery. He recommended medication and physical therapy. Dr. Haimson believed Claimant's "neuropraxia" would "continue to resolve." He did not recall performing a physical examination of Claimant at this visit. (EX-13, p. 14; CX-14, p. 6). Claimant remained off work. (CX-14, p. 6).

On November 6, 2002, Claimant returned to Dr. Haimson. Claimant indicated his condition worsened after receiving physical therapy. Dr. Haimson ordered an EMG/nerve conduction test because Claimant reported increased numbness in his extremity. (EX-13, pp. 16; CX-14, p. 6). Dr. Haimson recommended Claimant continue physical therapy and remain off work. (EX-13, pp. 16-17; CX-14, pp. 6, 9).

On December 9, 2002, Dr. Haimson reviewed the results of Claimant's nerve conduction study. The study was "normal" and revealed no permanent nerve damage. (EX-13, p. 17; CX-14, p. 6). Although there was no evidence of nerve damage, Dr. Haimson indicated a patient could have "symptoms in a nerve" but still have a normal nerve study. (EX-13, pp. 17, 20). He instructed Claimant to continue physical therapy, to continue his medication, and to remain off work. (EX-13, p. 17; CX-14, pp. 6, 10).

On January 6, 2003, Dr. Haimson again saw Claimant who reported some improvement with therapy. (EX-13, p. 21; CX-14, p. 7). However, "something" happened at a therapy session, and Claimant experienced pain between his scapula, shooting towards his left shoulder. (EX-13, pp. 21-22; CX-14, p. 7). Dr. Haimson was able to get little movement in Claimant's shoulder, which he described as "secondary" to Claimant's pain and "guarding." Claimant remained off work. (EX-13, p. 22; CX-14, p. 7).

He saw Claimant again on April 14, 2003, and released

Claimant to modified light work. (EX-13, p. 34; CX-14, p. 7). He assigned the following restrictions to Claimant's activities: light duty with no lifting of greater than five pounds, no climbing, no repetitive bending or squatting, no "outstretched" use of the arm, and no overhead activity. (EX-13, pp. 40-41, 55; CX-14, p. 7, 12). Claimant was not at MMI. (EX-13, p. 60).

In the interim between the January 2003 and April 2003 visit, Claimant obtained a second opinion from Dr. Po. (EX-13, pp 23-24). Dr. Haimson found Dr. Po's finding of "atrophy of the musculature" to be indicative of "disuse of the extremity." (EX-13, p. 59). Dr. Haimson agreed with Dr. Po's diagnosis of "left shoulder hyperabduction strain with neuritis lower brachial plexus transient improving." (EX-13, pp. 59-60).

He felt Dr. Po's finding of "degeneration of the C5-6" was significant because it suggested nerve root irritation which could create nerve symptoms in Claimant's extremity. (EX-13, pp. 25-26). He further indicated the x-ray likely showed a "narrowing of the disc space," which suggests degeneration. He testified that such degeneration "can be associated with pinching or at least irritation of the nerves that exit the neck at that level. . . ." (EX-13, pp. 26-27).

Dr. Haimson opined the disc degeneration was a pre-existing condition. (EX-13, p. 27). He agreed with Dr. Po's finding that Claimant's disc disease was "a degenerative condition unrelated to the accident in question." (EX-13, p. 28). However, he opined that Claimant had a "bad neck" prior to the accident and that the accident could have aggravated the pre-existing condition. (EX-13, p. 29). Such aggravation could cause new or greater symptoms; he would attribute the change in Claimant's symptoms to an intervening injury. (EX-13, pp. 51-52).

Claimant's pre-existing condition would affect his upper neck, shoulder, and any related pain symptoms.<sup>40</sup> However, the pre-existing condition would not affect Claimant's lower back. (EX-13, pp. 30-31). Additionally, Dr. Haimson opined that the degenerative disc in Claimant's neck could have continued to irritate Claimant's nerves and prevent any related symptoms from resolving. (EX-13, pp. 31, 47, 53).

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<sup>40</sup> Dr. Haimson testified that Claimant's symptoms of nerve irritation stemmed from his shoulder region, rather than his neck region. Consequently, he could not determine if Claimant's neck condition was aggravated by the injury. He did feel that Claimant's neck condition could have caused the injury to remain symptomatic. (EX-13, pp. 52-53).

Dr. Haimson testified that obesity would present a problem in resolving lower back pain, but would not affect Claimant's shoulder injury. He further did not believe Claimant's diabetes contributed to a lack of improvement in his paresthesia. (EX-13, pp. 33, 47).

Dr. Haimson estimated that an individual with a strain/sprain injury would be asymptomatic and able to return to normal activities within twelve weeks and he would have expected Claimant to present with no symptoms by April 2003. (EX-13, p. 11, 36). As Claimant continued to present with symptoms in April 2003, Dr. Haimson hoped he would benefit from medication and physical therapy. He noted that Claimant did not respond in a "typical fashion" to any treatment. (EX-13, p. 42).

Dr. Haimson's records do not reflect complaints of nose bleeds, dizziness, nausea or vomiting, lack of sleep, knee pain, migraine headaches, or loss of sex drive. (EX-13, p. 43). He would not attribute such symptoms to an acute injury, but suggested the symptoms would result from pain or a response to medication. (EX-13, p. 44).

Dr. Haimson identified Claimant's limited motion and lack of strength due to shoulder pain as "objective evidence" of pain. He found no objective evidence of injury "based upon x-rays or MRI or nerve conduction studies." (EX-13, p. 46). At the time he performed his examination, he had no reason to believe Claimant "purposely altered or controlled" any of the objective findings. (EX-13, p. 49, 53). According to Dr. Haimson, the injuries described by Claimant were consistent with the "mechanics" of the accident described by Claimant.<sup>41</sup> (EX-13, p. 50, 53).

#### **Dr. Robert Po**

Dr. Po examined Claimant on March 13, 2003, at Employer's request.<sup>42</sup> He reviewed Claimant's prior medical records, including the reports of Dr. Leckie and Dr. Haimson. (CX-18, pp. 2-3). Claimant reported that he sustained a work-related injury on September 18, 2002, when he slipped on a barge and was hanging over the side after grabbing a port line with his left

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<sup>41</sup> Specifically, the symptoms of hand paresthesia are consistent with a stretching of the brachial plexus. Tightness in Claimant's fourth and fifth fingers is consistent with "a strain of the flexor compartment of the forearm muscles." (EX-13, p. 54).

<sup>42</sup> Dr. Po's credentials are not included in the record.

arm. (CX-18, p. 4).

Dr. Po noted Claimant had not returned to work since his accident. He indicated Claimant could drive up to 60 miles at a time and had no trouble performing daily activities, e.g. dressing, bathing, and feeding himself. Claimant did report weakness in his arm, headaches, and nausea. (CX-18, p. 4). A physical examination revealed no paresthesia. Dr. Po noted pain with "extremes of motion." Although he found tightness of the muscles on Claimant's left side, Dr. Po indicated that no spasm was associated with the tightness. (CX-18, p. 5). Dr. Po further noted "mild atrophy" of Claimant's left shoulder muscles, but found no tender areas or swelling. He indicated Claimant's left upper arm was smaller than his right upper arm. He found decreased sensation in Claimant's left arm from his shoulder to his fingers and noted slight swelling in Claimant's fingers. Claimant demonstrated full motion of his lumbar spine with no spasm. (CX-18, p. 6).

An x-ray of Claimant's cervical spine showed no evidence of a fracture or dislocation. However, it did reveal a "straight cervical spine with some degeneration of disc C5-6 with a small posterior osteophyte formation." (CX-18, p. 7).

Dr. Po diagnosed Claimant with (1) "left shoulder hyperabduction strain with neuritis lower brachioplexus transient improving," (2) "cervical disc disease C5-6," and (3) "contusion of lumbar spine improved." (CX-18, p. 7). According to Dr. Po, Claimant's persistent pain and weakness of the left upper extremity is "documentary evidence to establish" a causal relation between Claimant's complaints and the accident. (CX-18, p. 7). Specifically, Dr. Po attributed Claimant's shoulder and left upper arm complaints to the "hyperabduction injury of the shoulder." (CX-18, p. 7). Additionally, he noted Claimant's diabetes would be relevant to Claimant's treatment and indicated that Claimant's obesity would contribute to his "decrease in ability to return to pre-injury status." Dr. Po also noted that Claimant's "C5-6" condition pre-existed the September 18, 2002 injury. (CX-18, p. 7).

Dr. Po considered Claimant's prognosis to be "fair" and recommended an injection into Claimant's "AC joint and subscapular bursa," as well as two months of continued physical therapy. He opined Claimant had not reached MMI. He further opined that the injuries would not result in a "ratable permanent impairment or disability." He opined Claimant could return to work with the following restrictions: light duty,

decreased use of the left upper extremity, no work above shoulder level, no use of hand control on the left, no push/pull, and no lifting of greater than 20 pounds. (CX-18, p. 8).

**Dr. William S. Fleet**

Dr. Fleet is board-certified in neurology and was deposed by the parties on October 14, 2004. (CX-21, p. 8). On February 24, 2004, Claimant presented a history of falling off a barge and catching himself with his left arm. Claimant reported feeling a "pop" in his upper back or neck. He experienced left arm pain and numbness in his medial three fingers. Claimant also complained of difficulty sleeping. He reported hitting his back and knee against the side of the barge. (CX-21, p. 14).

Upon examination, Dr. Fleet found "subjective hypesthesia to touch" in Claimant's left arm and a "little give way in Claimant's left arm strength." Claimant's reflexes were down, which Dr. Fleet attributed to his diabetes. He diagnosed Claimant with "cervical radiculitis" and considered a diagnosis of "brachial plexopathy." (CX-21, p. 23). Dr. Fleet opined the diagnoses were "more likely than not" related to Claimant's work accident. (CX-21, pp. 23-24). Dr. Fleet ordered an MRI of Claimant's cervical spine, which ultimately revealed mild arthritis of his lower cervical spine and degenerative disc disease.<sup>43</sup> (CX-21, p. 26; CX-22). He opined the arthritis and degenerative disc disease likely pre-dated Claimant's work injury. (CX-21, p. 51). On February 26, 2004, Dr. Fleet took Claimant off work pending tests and follow-up visits.<sup>44</sup> (CX-21, pp. 24-25; CX-20, p. 9).

Dr. Fleet continued to treat Claimant at monthly visits from March 2003 through September 2003. Essentially, there was no change in Claimant's complaints. (CX-21, pp. 27-36). On March 23, 2004, Claimant complained of increased pain and received a prescription for depression. (CX-21, p. 27). On April 20, 2004 Claimant's complaints included back and neck pain. Dr. Fleet prescribed a cervical traction collar and a moist heating unit. (CX-21, pp. 28-29). On May 18, 2004, Claimant also complained of a decrease in his sex drive. (CX-21, p. 30).

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<sup>43</sup> The MRI was performed on April 27, 2004. (CX-22).

<sup>44</sup> Dr. Fleet did not specifically express disagreement with Dr. Haimson's work release on April 14, 2003. Rather, Dr. Fleet indicated that he took Claimant off work because Claimant had not been to a doctor in six to twelve months. (CX-21, pp. 42, 48, 50).

On June 30, 2004, Dr. Fleet recommended monthly physical therapy treatments. (CX-21, p. 32). On August 25, 2004, Claimant's additional complaints included dizziness and dry mouth. He indicated he felt worse as a result of not taking his medications for two weeks due to "red tape."<sup>45</sup> (CX-21, p. 33). On September 22, 2004, Claimant indicated that he had benefited from physical therapy and the cervical traction brace. (CX-21, p. 34).

On October 13, 2004, Dr. Fleet ordered Claimant to undergo a bone scan and fractionated nerve studies of his left arm. Dr. Fleet ordered the tests because Claimant's pain had "been so extreme for so long." (CX-21, p. 36). Claimant remained off work and had not reached maximum medical improvement. (CX-21, pp. 37-38). At the time of Dr. Fleet's deposition, the bone scan and nerve studies had not been performed. However, he opined that he would recommend an FCE and/or a work hardening program for Claimant if the tests returned negative results. Dr. Fleet felt that Dr. Po assigned "pretty good" work restrictions to Claimant and he would agree with the restrictions unless the FCE indicated differently. (CX-21, pp. 37-38). Nonetheless, Dr. Fleet indicated that Claimant remained off work at the time of his deposition. (CX-21, p. 37). He was aware that Claimant worked "less than ten hours a week" as a delivery driver, but he declined to offer an opinion as to Claimant's capability to "return to certain employment duties" until he received the results of the pending bone scan and fractionated NCV of the arm. (CX-21, p. 49).

At his deposition, Dr. Fleet diagnosed Claimant with the following conditions: an injury to his brachial plexus, migraine headaches, chronic daily headaches, cervical radiculitis, lumbar strain, and a knee contusion. (CX-21, pp. 38-39). He indicated that he actually treated Claimant for symptoms relating to back pain, neck pain, migraines, numbness, shoulder pain, decreased sex drive, nose bleeds, tingling in his fingers, dizziness, nausea, insomnia, knee contusion, and depression. Dr. Fleet opined that all of Claimant's symptoms stemmed from his work injury or a combination of the injury and not working. (CX-21, p. 52).

Dr. Fleet reviewed a September 26, 2002 x-ray ordered by Dr. Leckie. He described the x-ray as "normal" and showing

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<sup>45</sup> On August 12, 2004, Dr. Fleet wrote a letter to assist Claimant in obtaining a TENS unit. (CX-21, p. 32).

"minor degenerative changes, but nothing unusual for a person who did that type of physical activity." (CX-21, p. 40).

Dr. Fleet indicated that no physicians had recommended surgery for Claimant. He further indicated that his findings regarding Claimant's conditions were based on Claimant's subjective complaints. (CX-21, p. 41).

Regarding his shoulder, Claimant specifically complained of pain and limited range of motion. When Dr. Fleet moved Claimant's shoulder for him, he found that it was not fixed or locked. (CX-21, p. 43). He diagnosed a shoulder sprain/strain based on the complaints of pain. (CX-21, p. 44). As to Claimant's fingers, the complaints of tingling are the kind that Dr. Fleet would expect from a patient with a "lower limb brachial plexus stretch."<sup>46</sup> (CX-21, p. 45).

Dr. Fleet agreed with the opinions of Drs. Po and Haimson who concluded that Claimant's x-rays were consistent with a "long-standing degenerative condition." (CX-21, p. 47). However, he also opined that it was "more likely than not" that Claimant's work injury aggravated the pre-existing conditions in the shoulder, neck, arm, back, and knee. (CX-21, p. 56).

Following his deposition, Dr. Fleet again examined Claimant on November 10, 2004. In response to a request by Claimant dated December 16, 2004, Dr. Fleet indicated that the "EMG/NCV" study revealed left carpal tunnel syndrome and the bone scan revealed "arthritis in several parts and prior rib fractures." He indicated the diagnoses were more likely than not causally related to Claimant's work injury. (CX-34, p. 1). His response indicated Claimant had reached MMI.<sup>47</sup> He assigned a 15% impairment to Claimant's body as a whole resulting from the "cervical radiculitis/brachial plexus neuritis," as well as a 2.5% impairment to Claimant's body as a whole resulting from the left carpal tunnel syndrome. Additionally, Dr. Fleet opined that Claimant's headaches resulted in a 2.5% impairment to his body as a whole. (CX-34, p. 1).

Dr. Fleet signed a "Functional Capacities Work Restriction

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<sup>46</sup> Dr. Fleet opined Claimant's condition is not likely related to his arthritis. (CX-21, p. 45). Claimant's diabetes would make him more susceptible to a nerve injury, but Dr. Fleet would expect "bilateral" symptoms in such an instance. Nonetheless, he indicated that diabetes could "exacerbate" the symptoms caused by Claimant's injury. (CX-21, p. 46).

<sup>47</sup> Dr. Fleet did not provide an MMI date. However, he attached a FCE dated December 29, 2004, to his response.

Form" on December 29, 2004, which he attached to his reply to Claimant's December 16, 2004 letter. Dr. Fleet released Claimant to part-time work at four hours each day, five days a week. He indicated Claimant could continuously carry up to 10 pounds and frequently carry 11 to 20 pounds. Dr. Fleet further allowed Claimant to occasionally carry 21 to 50 pounds. Claimant's weight restrictions for his push/pull capabilities mirrored his lifting restrictions. (CX-34, p. 2).

Further, Claimant was never to engage in climbing or balancing activities. Claimant was allowed to perform the following activities on occasion: bend/twist, stoop, kneel, crouch, crawl, and reach. (CX-34, p. 2). Dr. Fleet indicated Claimant's use of his left hand was restricted, specifically for activities requiring "simple grasping" and "fine manipulation." Dr. Fleet opined Claimant's restrictions were permanent. (CX-34, p. 3).

#### **Passman-Haimson Orthopedic Sports & Rehab Physical Therapy Department**

Claimant attended physical therapy from October 28, 2002 through January 13, 2003. He complained of soreness along his ribs, tightness and pain in his shoulder, and soreness in his cervical spine. Claimant complained of no feeling in his fourth and fifth fingers, as well as in "the entire medial aspect of upper extremity." Claimant indicated that he had difficulty sleeping. (CX-16, pp. 1-7). Generally, Claimant experienced a reduction in pain upon completion of each physical therapy session, although he did report an occasional increase in pain after treatment.

On January 13, 2003, Claimant indicated that he did not feel he received any benefit from the continued physical therapy. After consulting with Dr. Haimson, Claimant was instructed to discontinue physical therapy as no progress had been achieved. (CX-16, p. 8).

On April 23, 2003, Claimant returned to physical therapy with continued complaints of pain and numbness in his left arm and shoulder. A physical exam revealed "slight shoulder asymmetry" when Claimant was in the standing position. His left shoulder was lower than his right shoulder. Also, "generalized muscle atrophy" was noted in comparison to Claimant's right upper extremity. Claimant did not undergo any treatment due to his increased complaints of pain following therapy. (CX-16, p. 10).

On April 28, 2003, Claimant indicated he returned to work "taping/drafting barges." He had "good tolerance" of exercises and did not report a significant increase in pain. On April 30, 2003, Claimant reported a burning in the left side of his neck. He indicated he worked 18 hours "off and on." (CX-16, p. 11). Claimant experienced increased pain with exercises. (CX-16, p. 12). The record does not indicate the number of days that Claimant worked upon his return to work.

### **The Vocational Evidence**

#### **Larry S. Stokes, Ph.D.**

Dr. Stokes was deposed by the parties on November 20, 2004. (EX-22). On November 3, 2004, Dr. Stokes completed a vocational rehabilitation report at Employer's request. (EX-19). In preparing his report, Dr. Stokes reviewed the following information: Claimant's deposition testimony; the first report of injury; medical records from Drs. Graeber, Leckie, Haimson, Po and Fleet; Claimant's physical therapy records; an MRI; medical records from Natchez Regional Medical Center; and a Job Functions Capabilities Form. (EX-19, pp. 1-2). Dr. Stokes also considered Claimant's age, location, capabilities, criminal background, education and training, and work history.<sup>48</sup> (EX-22, pp. 11-12). In performing his research, Dr. Stokes looked for employment opportunities in southern Mississippi and along the Gulf Coast. He estimated the job search area was 23 miles from Claimant's home. (EX-22, pp. 27, 29).

Regarding Claimant's medical restrictions, Dr. Stokes noted that Dr. Leckie and Dr. Fleet failed to address Claimant's physical capabilities and employability. (EX-19, p. 6). He noted that Dr. Po assigned the following restrictions as of March 13, 2003: light duty work with decreased use of his left upper extremity, avoid work above shoulder level, avoid use of hand controls on the left, and avoid pushing/pulling/lifting of greater than 20 pounds. Dr. Stokes also indicated that Dr. Po specifically assigned no restrictions to Claimant's sitting, standing, or walking activities. (EX-19, p. 4; EX-22, p. 15).

Dr. Stokes also considered Dr. Haimson's restrictions assigned to Claimant on April 14, 2003. These restrictions included "modified light work to exclude heavy lifting," no use

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<sup>48</sup> Dr. Stokes indicated that Claimant's prior conviction should not prevent him from being considered for the casino employment positions identified herein. (EX-22, p. 49).

of his arm when outstretched or overhead, no ladder climbing, and no repetitive bending or stooping.<sup>49</sup> (EX-22, p. 15).

According to the Dr. Stokes, Claimant's former occupation was considered of "light" physical demand level based on the description provided by Employer.<sup>50</sup> Consequently, Dr. Stokes believed Claimant could return to his usual employment with the restrictions assigned by Drs. Haimson and Po. (EX-22, pp. 19-21).

Dr. Stokes identified "alternate jobs" within the sedentary to light physical demand levels that he believed Claimant was capable of performing. For the sedentary demand level, Dr. Stokes identified the occupations of "order clerk," "dispatcher," and "surveillance system monitor." According to Dr. Stokes, these positions paid weekly wages ranging from \$468.00 to \$502.80. (EX-19, p. 7). Dr. Stokes did not provide a description of the specific job duties or physical requirements for any of the positions.

For the light demand level, Dr. Stokes identified the following six occupations: (1) courier/messenger, (2) parts salesperson, (3) self-service station attendant, (4) cashier, (5) counter attendant, and (6) hotel clerk. These positions paid weekly wages ranging from \$268.80 to \$482.80. (EX-19, p. 7). Again, Dr. Stokes did not provide a description of the specific job duties or physical requirements for any of the listed positions.

Dr. Stokes also performed labor market research by contacting employers within Claimant's geographic area. He identified four available job openings:

(1) a full-time concierge at Casino Magic in Biloxi, Mississippi. (EX-19, p. 7; EX-22, p. 28). The position was light duty. The employee would greet guests, give visitor information, and assist with "check in and out

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<sup>49</sup> Dr. Stokes included sedentary and light duty jobs in his vocational report because of conflicting restrictions assigned by Dr. Haimson. On April 7, 2003, Dr. Haimson restricted Claimant to lifting of less than 5 pounds, which falls under the sedentary classification. However, the later restriction of "modified light duty work" increases the lifting restriction to occasional lifting of 20 pounds and frequent lifting of 10 pounds. (EX-22, pp. 14-15, 25-26).

<sup>50</sup> The "Job Function Capabilities Form" sets forth lifting and carrying requirements of less than 5 pounds. It requires frequent standing, bending, walking, and reaching. The job also involved infrequent kneeling, sitting, and climbing. (EX-9, p. 1).

procedures.”<sup>51</sup> The job required alternate standing, walking, bending, and stooping. The position did not involve lifting. The hourly wage ranged from \$8.00 to \$10.52. (EX-19, p. 7).

(2) a valet runner at the Copa Casino in Gulfport, Mississippi. (EX-19, p. 8; EX-22, p. 28). The opening was for a part-time or full-time position that paid between \$6.03 and \$7.41 per hour. The position was light duty. The job required parking and retrieving automobiles. It involved alternate standing, sitting, and walking. Additionally, the job required occasional stooping, but no lifting. (EX-19, p. 8).

(3) a counter attendant at the Beau Rivage in Biloxi, Mississippi. (EX-19, p. 8; EX-22, p. 28). The position was either part-time or full-time and was described as a “light-medium” classification. The duties included operating a cash register, making coffee, and selling pastries. The position required alternate standing and walking, as well as occasional bending and stooping. The position also required lifting of a maximum of 25 pounds, with assistance as needed. The job paid between \$6.13 and \$7.01 per hour. (EX-19, p. 8).

(4) a dining room attendant at the Isle of Capri in Biloxi, Mississippi. (EX-19, p. 8; EX-22, p. 28). The position was in the “light-medium” classification. The job duties included cleaning and setting tables and stocking “wait stations.” The job required alternate standing and walking, as well as occasional bending and stooping. The position also required lifting of a maximum of 25 pounds, with assistance as needed. (EX-19, p. 8).

Dr. Stokes provided the foregoing job descriptions to Claimant’s physicians. However, Dr. Haimson, Dr. Po, and Dr. Fleet did not provide an opinion about the suitability of the employment positions. (EX-19a, p. 1; EX-22, pp. 32, 34-35).

On November 24, 2004, Dr. Stokes composed a second vocational rehabilitation report. (EX-19a). Prior to generating the second report, Dr. Stokes met with Claimant, who reported difficulty with driving. He reported difficulty

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<sup>51</sup> Although Claimant did not have computer skills, Dr. Stokes indicated the position would likely offer on-the-job training. Given Claimant’s educational history, skills, and work history, Dr. Stokes felt Claimant could learn the necessary skills through on-the-job training. (EX-22, p. 50).

turning his head to the left and that he required breaks every 30 minutes to one hour during long distance drives. (EX-19a, p. 10).

Dr. Stokes performed vocational testing on Claimant which confirmed the information he had prior to that time. (EX-22, p. 36). The testing revealed that Claimant was in the "low average" range of intellectual functioning. Claimant was able to perform math and reading activities. The testing indicated Claimant was practical, mechanically and scientifically inclined, and likes to work with his hands. (EX-22, p. 38).

Claimant did not believe he could return to his former employment. However, based on the job description provided by Employer and the work restrictions assigned by Drs. Haimson and Po, Dr. Stokes concluded Claimant could return to his former employment. Dr. Stokes also concluded Claimant could return to the jobs identified in his work history. (EX-19a, p. 13). Dr. Stokes felt Claimant made a diligent effort in his job search, noting that Claimant indicated he applied for the job leads provided in the November 3, 2004 report. Claimant additionally applied for one job on his own and secured part-time employment as a "parts delivery driver." (EX-19a, p. 14).

#### **Tom Stewart**

Mr. Stewart is a certified vocational rehabilitation counselor and was deposed by the parties on December 20, 2004. (CX-33). On December 15, 2004, Mr. Stewart generated a vocational rehabilitation evaluation at the request of Claimant. In preparing his evaluation, Mr. Stewart met with Claimant and reviewed the depositions of Claimant, Dr. Fleet, Dr. Haimson, and Dr. Stokes. He also reviewed the vocational reports compiled by Dr. Stokes, along with various medical reports from Claimant's physicians. (CX-33, pp. 12, 74).

In reviewing Claimant's restrictions, Mr. Stewart noted that Dr. Fleet had not released Claimant to work. However, it was also noted that Dr. Fleet would agree with the restrictions assigned by Dr. Po, unless an FCE indicated otherwise. Consequently, Mr. Stewart used the restrictions set forth by Dr. Po in evaluating Claimant.<sup>52</sup> (EX-33, pp. 25-26, 76). He suggested the restrictions imposed by Dr. Po placed Claimant in a "modified-light type work classification." (CX-33, p. 28).

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<sup>52</sup> Mr. Stewart agreed that Dr. Po had not placed restrictions on Claimant regarding "turning the neck" or use of his right upper extremity. (CX-33, p. 56).

Mr. Stewart considered Claimant's age, education, work history, and physical restrictions. He concluded Claimant was capable of performing a "limited range" of unskilled to semi-skilled light jobs. Mr. Stewart noted that Claimant's job opportunities would be limited due to the restricted use of his dominant left hand and upper extremity as ordered by Dr. Po. (CX-33, pp. 37-38, 78). Mr. Stewart also indicated that Claimant's past felony conviction would make him ineligible for a "fairly wide range of jobs." (CX-33, pp. 38, 79).

Mr. Stewart noted that three jobs identified by Dr. Stokes were not suitable to Claimant because the jobs required "frequent or constant reaching and handling with both upper extremities." The three jobs were "valet runner," "counter attendant," and "dining room attendant." (CX-33, p. 78). Regarding the "valet runner" position, Mr. Stewart also noted the job required rotation of the neck on a "quick basis." (CX-33, p. 46). Regarding the dining room attendant position, Mr. Stewart also noted that it is classified by the Dictionary of Occupational Titles (DOT) as a "medium strength level" job, which would increase the lifting requirement to 50 pounds on an occasional basis. (CX-33, p. 48).

Mr. Stewart also concluded the "concierge" position would not be suitable employment for Claimant. While Mr. Stewart agreed that Claimant could physically perform the sedentary activities required by the position, he did not feel Claimant had the experience, social skills, personality, or manner to be considered for the job. (CX-33, pp. 42-44, 79). Mr. Stewart indicated the DOT assigned a "specific vocational preparation time" of four to six months of experience and training to adequately perform the duties of a concierge. (CX-33, p. 43).

Mr. Stewart could not find a DOT description for the job title of "barge/field surveyor." However, he did find a DOT description for a "cargo checker," which involved checking temperatures. (CX-33, pp. 17-18, 75). The DOT classified the "cargo checker" position as a "light" job requiring frequent use of both hands and arms. (CX-33, p. 75). Mr. Stewart did not believe Claimant could perform the "cargo checker" job if it required frequent or constant use of his left upper extremity. (CX-33, p. 41).

Mr. Stewart did not attempt to locate any jobs for Claimant. (CX-33, p. 50). The DOT assigns a medium demand level to a delivery driver job. (CX-33, p. 52). However,

Claimant indicated that his restrictions had been accommodated by his current employer through modifications to vehicle mirrors and no lifting of greater than 10 or 15 pounds.<sup>53</sup> (CX-33, pp. 65-66). Consequently, Mr. Stewart opined the strength requirements for the position would fall within the "light, modified light" range. (CX-33. pp. 67).

### **The Contentions of the Parties**

Claimant contends he sustained a work-related injury on September 18, 2002, while employed as a barge surveyor. He contends Employer has failed to demonstrate suitable alternative employment; thus, he was temporarily totally disabled from May 1, 2003 through December 28, 2004 and has been permanently totally disabled from December 28, 2004 through present and continuing. Claimant argues he is entitled to compensation payments based on an average weekly wage of \$580.05, along with medical benefits.

Employer argues that Claimant did not sustain injuries to his back and shoulder on September 18, 2002. Accordingly, Employer contends Claimant is entitled to no compensation benefits. Employer also argues Claimant can return to his pre-injury employment with no economic loss. Employer further contends it has established suitable alternative employment with a wage earning capacity of \$420.80. Employer avers that Claimant's average weekly wage is \$268.64, based on Claimant's total earnings for the year 2002, rather than on his earnings during his tenure with Employer.

### **IV. DISCUSSION**

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

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<sup>53</sup> Mike's built an "extended mirror" on the vehicle so Claimant would not have to completely rotate his head while driving. (CX-33, pp. 52-53).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

#### A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9<sup>th</sup> Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

##### 1. Claimant's Prima Facie Case

Claimant contends he sustained physical harm during the

course and scope of his employment on September 18, 2002. He alleges he slipped on the deck of a barge, grabbed a line with his left hand, and was suspended over the water until he was able to pull himself back onto the barge. Employer contends Claimant has not presented a **prima facie** case due to his failure to establish an accident and injury.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982).

In the present matter, Claimant reported left arm, left shoulder, and neck pain to Dr. Leckie on September 18, 2002. Further, Claimant explained to Dr. Leckie that he fell while surveying a barge and grabbed onto a rope with his left hand. Claimant presented with similar complaints of pain to the remaining three physicians who either examined or treated him. Specifically, Drs. Haimson and Po diagnosed Claimant with a left shoulder strain due to his complaints of left shoulder pain. Drs. Haimson, Po, and Fleet noted Claimant experienced lower back pain. Dr. Po and Dr. Fleet noted complaints of neck pain, which Dr. Po diagnosed as cervical disc disease. The reports and depositions of Dr. Haimson and Dr. Fleet indicate complaints of left hand numbness. Additionally, Dr. Fleet diagnosed Claimant with a knee contusion and headaches, in addition to his diagnoses related to his arm/hand, neck, shoulder, and lower back pain.

Claimant provided all of his physicians with almost identical reports of falling from a barge and grabbing a rope. Dr. Haimson opined that Claimant's reported injuries were consistent with the mechanics of the described accident. Similarly, Drs. Po and Fleet opined that Claimant's complaints were causally related to the described accident. Although Drs. Haimson, Po, and Fleet diagnosed Claimant with pre-existing disc degeneration, both Dr. Haimson and Dr. Fleet indicated that Claimant's work injury would have aggravated his pre-existing condition.

Claimant informed his supervisor of the accident on September 18, 2002. According to Mr. Sanford, Claimant stated that he tripped, grabbed a "bowline," and injured his shoulder. Further, Employer's "First Report of Injury" indicated that Claimant "pulled his shoulder area" when he "caught himself with

the bowline to keep from falling in the water."

Based on the foregoing, I find and conclude Claimant has established a **prima facie** case sufficient to invoke the Section 20(a) presumption. Thus, Claimant has set forth a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on September 18, 2002, and that working conditions and activities on that date could have caused the harm or pain. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

## 2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT) (5<sup>th</sup> Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in

order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5<sup>th</sup> Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5<sup>th</sup> Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

In rebuttal, Employer contends the medical evidence does not support a finding of work-related shoulder and back injuries. It points out that Claimant's physicians have failed to identify any objective evidence to support the claimed injuries. It contends Claimant misled his physicians with "inconsistent and unsubstantiated" complaints of pain and self-limitation.

While Employer has not offered any medical opinions to contradict a causal connection between Claimant's accident and injuries, I find it is significant that no physician has identified any objective evidence of an injury. I find the physicians' reliance on Claimant's subjective complaints even more significant in light of the credibility issues raised by Employer.

Employer further contends that Claimant altered his "story" regarding the mechanics of the injury. It points to the testimony of Mr. Toussaint, who testified that Claimant stated he injured his shoulder by walking into a barge "knuckle." Employer also contends that Claimant's version of the accident "defies logic."

Employer's rebuttal argument is not entirely without support and appeal, but it does not specifically rebut

Claimant's case. Assuming **arguendo** Claimant's credibility as to the mechanics of his accident is questionable, for purposes of explication, I find it necessary to weigh and evaluate the record evidence as a whole to determine work-relatedness and causation.

### 3. Conclusion or weighing all the evidence

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 378 (5<sup>th</sup> Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

I find and conclude Claimant sustained compensable work-related injuries. Employer's rebuttal of the **prima facie** case hinges upon a lack of objective medical evidence to support an injury. Although Employer attempts to cast doubt upon the reliability of Claimant's subjective complaints of pain by discrediting Claimant, I am not persuaded by its arguments.

When presented with the conflicting testimony of Mr. Toussaint and Claimant, I afford greater weight to Claimant's testimony regarding the mechanics of the injury. Mr. Toussaint testified that he was not present when the accident occurred. Although he testified that Claimant reported walking into a "knuckle," Claimant provided almost identical descriptions of the accident to Employer and his physicians.<sup>54</sup> Consequently, I find there is not sufficient discrepancy in Claimant's accident reports to discount his testimony and I do not afford weight to Mr. Toussaint's version of the events, which is otherwise unsupported in the record.

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<sup>54</sup> Based on his discussion with Claimant, Mr. Sanford believed that Claimant "tripped and was able to grab a line to stop from falling into the water." I find that this is arguably consistent with Claimant's report of falling over the bow and hanging by the bow line.

Additionally, I decline to discount Claimant's credibility based on Employer's contention that his "version of the events . . . defies logic." I find Claimant's testimony and the reports of Claimant's physicians establish that he sustained an injury on September 18, 2002. Dr. Fleet opined that Claimant's complaints and symptoms were consistent with the mechanics of the described accident. Additionally, Mr. Toussaint saw Claimant "favoring" and rubbing his shoulder on the date of the accident, as if it was hurt. Consequently, I find that an accident occurred on the night in question regardless of whether or not Claimant's account of the events is logical.

Finally, three physicians have opined that Claimant's injuries are causally connected to the described accident. Despite a lack of "objective" evidence, these physicians are in agreement that Claimant sustained injuries to his left shoulder and arm, neck, and back. Dr. Haimson did not believe Claimant "purposely altered or controlled" any of his findings. Additionally, after finding Claimant credible, I find no reason to doubt his subjective complaints of pain. Consequently, I find no reason to discount the opinions of three physicians who, based on the subjective complaints of pain, found that Claimant suffered from injuries causally related to the work accident. Employer has offered no other evidence or medical opinions to sever such a causal connection.

Based on the foregoing, I find and conclude that Claimant sustained compensable work-related injuries to his neck, lower back, and left arm and shoulder during an accident in the course and scope of his employment on September 18, 2002. I further find and conclude that Claimant's right knee injury is not compensable. Claimant did not present complaints of knee pain to Dr. Leckie, Dr. Haimson, or Dr. Po. The medical records first reflect complaints of knee pain during Claimant's course of treatment with Dr. Fleet in February 2004, nearly one and one-half years after the date of the work-related accident.

#### **B. Nature and Extent of Disability**

Having found that Claimant suffers from compensable injuries, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an

economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968) (per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22

BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

### **C. Maximum Medical Improvement (MMI)**

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., *supra*; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The parties stipulated and I find that Claimant was temporarily totally disabled from September 18, 2002 to April 30, 2003, when he was released to modified employment.

On April 14, 2003, Dr. Haimson indicated Claimant could return to "modified light work to exclude heavy lifting."<sup>55</sup> He instructed Claimant to avoid "outstretched" or "overhead" use of his arm. Additionally, Claimant was to avoid climbing ladders, as well as repetitive bending and stooping. At the time of his May 1, 2003 return to work, neither Dr. Leckie, Dr. Haimson, nor Dr. Po had indicated that Claimant had reached maximum medical improvement (MMI).

According to Employer's "Job Functions Capabilities Form,"

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<sup>55</sup> Based on the April 7, 2002 injury status report, I find that any objects weighing greater than 5 pounds would comprise "heavy lifting." The record does not reference an April 7, 2002 examination by Dr. Haimson, nor does it contain an injury status report dated April 14, 2002. However, I find the restrictions on the injury status report of April 7, 2002, are essentially the same as the restrictions assigned on April 14, 2002. As the parties have stipulated to payment of benefits through April 30, 2002, the restrictions assigned on both dates are considered together as the applicable restrictions

the position of a "field inspector/barge surveyor" complied with Claimant's lifting restriction, as the position required lifting and carrying of less than 5 pounds.<sup>56</sup> However, the form also indicated that the position required "frequent" bending and reaching. I find these two activities conflict with the work restrictions that were assigned by Dr. Haimson of no repetitive bending and no outstretched use of the arm.

Further, Mr. Sanford indicated that Claimant's post-injury job offer differed from his pre-injury employment, as Claimant would be working solely at the Exxon-Mobil facility in Baton Rouge upon his return to work. According to Mr. Sanford, Claimant would no longer perform surveying assignments in "fleeting operations" in order to comply with his limitations. Based on the testimony of Mr. Sanford, I find that Claimant was unable to perform his regular job duties as a result of his work restrictions.

Based on the foregoing, I further find and conclude Claimant established a **prima facie** case of temporary total disability from May 1, 2003 through February 25, 2004 because he could not return to his pre-injury employment due to the work restrictions imposed by Dr. Haimson.

On February 26, 2004, Claimant was taken off work by Dr. Fleet. Consequently, Claimant was unable to return to any employment from February 26, 2004, until Dr. Fleet released him with permanent restrictions on December 29, 2004. At that time, Dr. Fleet released Claimant to part-time work. I find that Employer's job description complies with the lifting restrictions assigned by Dr. Fleet. However, the "field inspector/barge surveyor" position required "frequent" bending and reaching, while Dr. Fleet indicated Claimant could engage in bending and reaching activities only on an "occasional" basis. Additionally, Claimant and Mr. Sanford testified that the barge surveyor position required use of a long and thin temperature probe. Because Dr. Fleet restricted Claimant's use of his dominant left hand for "simple grasping," I find that such restriction would hinder Claimant's ability to perform probing activities and thus return to his former job.

Dr. Fleet declined to assign MMI to Claimant's condition until he received the results of a bone scan and fractionated nerve study that he had ordered. Upon receiving the outstanding

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<sup>56</sup> Although Dr. Po assigned less restrictive lifting and carrying limitations of up to 20 pounds, I afford greater weight to the restrictions assigned by Claimant's treating physician.

test results, Dr. Fleet indicated Claimant reached MMI. He did not provide an MMI date, but his opinion that Claimant reached MMI was attached to a FCE which he signed and dated on December 29, 2004.

Based on the foregoing, I find and conclude Claimant established a **prima facie** case of temporary total disability from February 26, 2004 until December 29, 2004, because he was unable to return to any type of work and had not reached MMI. I further find and conclude that Claimant established a **prima facie** case of permanent total disability from December 29, 2004 through present and continuing, as he reached MMI and could not return to his former employment with the restrictions assigned by Dr. Fleet.

#### **D. Suitable Alternative Employment**

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

- (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
- (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge

to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

#### **May 1, 2003 through February 25, 2004**

I find and conclude Employer did not establish suitable alternative employment from May 1, 2003 through February 25, 2004. Employer relies on its April 25, 2003 offer of a barge

surveyor position as evidence of suitable alternative employment. I find that the employment offer does not constitute suitable alternative employment.

Most notably, I find the offered "field inspector/barge surveyor" position includes job requirements that do not comply with the restrictions assigned by Dr. Haimson on April 14, 2003. Specifically, Employer's "Job Functions Capabilities Form" identifies "frequent" bending and reaching requirements. I find that "frequent" bending fails to comply with Dr. Haimson's instruction that Claimant should "avoid" bending. Additionally, without more, the "reaching" requirement is arguably inconsistent with Claimant's restriction against overhead use of his arm and outstretched use of the arm. As Claimant's work restrictions preclude him from performing the required job activities, I find and conclude that Employer has not demonstrated suitable alternative employment through its job offer dated April 25, 2003.

Assuming **arguendo** that the April 2003 offer of employment complied with Claimant's work restrictions, I still find that the offer did not establish suitable alternative employment. While a job in an employer's facility may constitute suitable alternative employment, to do so the job must be actually available to the claimant. See Mendez v. National Steel and Shipbuilding Co., 21 BRBS 22 (1988), citing Darden v. Newport News Shipbuilding and Dry Dock Co., 18 BRBS 224, (1986); Price v. Dravo Corp., 20 BRBS 94 (1987). In Mendez, supra, the claimant was laid off by the employer due to a lack of available "light work." The Board found the employer in Mendez withdrew the opportunity for the claimant to perform suitable alternative employment within its facility. Consequently, the Board found the claimant totally disabled, distinguishing the employer's withdrawal of suitable employment from a termination caused by the actions of the employee.

In the present matter, AIMCOR refused to grant Claimant access to the Exxon-Mobil dock, which was an integral requirement of the offered position because Claimant was to perform his duties solely at the Exxon-Mobil facility. AIMCOR was not Claimant's employer nor did an employment agreement exist between AIMCOR and Employer. AIMCOR simply had the power to deny the workers' access to the dock. Because AIMCOR could and did deny Claimant's access to the work premises, I find that Employer offered a position to Claimant that was not "actually" available because he could not gain admittance to his place of employment.

While Claimant's termination papers indicated he was "involuntarily" terminated at the request of a customer, AIMCOR did not have the power to terminate any of Employer's workers. Accordingly, I find the decision to terminate Claimant was made solely by Employer.

Claimant agreed that he used the AIMCOR phone lines for personal phone calls and he agreed that he brought his fiancée to the work premises on one occasion. Although Claimant was arguably denied access to the facility due to his own malfeasance, Mr. Sanford testified that Claimant's termination was not caused by his improper conduct. Rather, once Claimant was denied access to the Exxon-Mobil facility, Employer no longer had positions that Claimant could perform with his restrictions.

Based on the testimony of Mr. Sanford, I find that Employer terminated Claimant for reasons not attributable to Claimant's own actions and remains bound to demonstrate other suitable alternative employment. Employer did not identify other suitable employment within its facility nor did Employer identify other suitable alternative employment through labor market surveys and vocational evidence during this time period.

Based on the foregoing, I find and conclude that Employer offered Claimant a position that did not constitute suitable alternative employment due to its failure to comply with Claimant's restrictions. Further, I find and conclude the offer of employment was not "actually available" to Claimant. Finally, I find and conclude Employer failed to identify other suitable alternative employment within its own facility or with other potential employers. Consequently, I find and conclude Claimant is entitled to temporary total disability from May 1, 2003 through February 25, 2004, based on his average weekly wage of \$588.83, as discussed below.

#### **February 26, 2004 through July 1, 2004**

On February 26, 2004, Dr. Fleet signed an "excuse" form that took Claimant off all work pending an office visit scheduled in March 2004. The record does not indicate that Dr. Fleet subsequently released Claimant to work at any level, prior to December 2004. Further, Employer did not attempt to demonstrate suitable alternative employment prior to July 1, 2004. Accordingly, I find and conclude that Claimant remained temporarily totally disabled from February 26, 2004 through July

1, 2004 and is entitled to temporary total disability benefits based on his average weekly wage of \$588.83.

**July 1, 2004 through December 29, 2004**

At formal hearing, Claimant testified that he began working a part-time job in late June 2004 or early July 2004.<sup>57</sup> Claimant testified that he earned \$6.00 per hour and that he had earned a total of \$1,080.00 at the time of hearing. Employer contends that Claimant's part-time job evidences suitable alternative employment and that Claimant was thus entitled to temporary partial disability upon acquiring part-time employment.

The requirements of the proposed suitable alternative employment must be compared with the claimant's physical and mental restrictions based on the medical opinions of record. See Villasenor v. Marine Maintenance Industries, Inc., supra; See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Evidence of specific job openings available at any time during the critical period when the claimant is medically able to seek work is sufficient to establish the availability of suitable alternative employment. Bryant v. Carolina Shipping Company, Inc., supra.

In the present matter, Claimant had not been released to return to work as of July 1, 2004. Further, Dr. Fleet had not provided an opinion as to what, if any, work activities Claimant was capable of performing at that time. Even at the time of his deposition on October 14, 2004, Dr. Fleet indicated that he had not yet released Claimant to return to work. Although Dr. Fleet was aware that Claimant had performed part-time work as a delivery driver, he declined to offer an opinion as to whether Claimant was capable of returning to "certain employment activities." Rather, Dr. Fleet indicated that he would defer providing a return to work status until he received the results of the pending bone scan and fractionated nerve studies.

Although Drs. Haimson and Po released Claimant to restricted work activities in March and April 2003, Dr. Fleet became Claimant treating physician as of February 24, 2004. Consequently, I afford greater weight to his opinion regarding Claimant's work capabilities and treatment status. Without some

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<sup>57</sup> Neither party provided employment records from Mike's and Claimant's start date was not identified in the record. Because Claimant testified that he began working at the end of June or beginning of July, the date of July 1, 2004 will be used as the start date of his employment with Mike's.

indication of Claimant's work capabilities as of July 1, 2004, I find it impossible to determine whether Claimant's part-time employment constitutes suitable alternative employment. Further, as Claimant should have remained completely off work according to Dr. Fleet, I find and conclude that Claimant was not capable of returning to any work and, thus, no type of employment would have been suitable in July 2004. Consequently, Claimant's part-time job could not establish suitable alternative employment.

Employer also contends that suitable alternative employment is identified in two labor market surveys dated November 3, 2004 and November 24, 2004. I find and conclude the labor market surveys do not demonstrate suitable alternative employment. The labor market surveys were based on the restrictions assigned to Claimant by Drs. Haimson and Po in March and April 2003. Claimant began treatment with Dr. Fleet in the interim between the assignment of these restrictions and the compilation of the vocational reports. Dr. Fleet had not assigned work restrictions or released Claimant to work as of November 3, 2004 or November 24, 2004. Without a release from Dr. Fleet, I find and conclude Claimant was unable to work and remained totally disabled.

Based on the foregoing, I find and conclude that Claimant is entitled to temporary total disability benefits from July 1, 2004 through December 28, 2004, based on his average weekly wage of \$588.83.<sup>58</sup>

#### **December 29, 2004 through present and continuing**

On December 29, 2004, Dr. Fleet released Claimant to return to work with restrictions on his activities. The restrictions included the following weight limitations on Claimant's carrying and push/pull capabilities: up to 10 pounds on a continuous basis; between 11 pounds and 20 pounds on a frequent basis; and between 21 pounds and 50 pounds on an occasional basis. Claimant was never to engage in climbing or balancing activities. Additionally, he could occasionally bend/twist, stoop, kneel, crouch, crawl, or reach. Claimant could not perform activities that required grasping or "fine manipulation" using his left hand.

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<sup>58</sup> Employer is not entitled to receive a credit for Claimant's wages earned at Mike's from July 1, 2004 through December 28, 2004, as only compensation benefits paid by Employer may be offset. See 33 U.S.C. §903(e); Chavez v. Todd Shipyards Co., 27 BRBS 80 (1993), aff'd on recon. en banc, 28 BRBS 185 (1994).

On November 3, 2004, Dr. Stokes generated a vocational report and opined Claimant could perform his pre-injury job duties, as well as four additional available jobs in the Gulfshore/Mississippi area. He also identified nine "alternate jobs" that he believed Claimant could perform. These jobs will be considered in light of the restrictions assigned by Dr. Fleet on December 29, 2004.

When Dr. Stokes opined Claimant could return to his prior employment, he did not consider the later restrictions provided by Dr. Fleet. After comparing Dr. Fleet's restrictions to the activities described in Employer's "Job Functions Capabilities Form," I find Claimant's pre-injury employment does not constitute suitable alternative employment. Specifically, the job description required Claimant to engage in frequent bending and reaching, while Dr. Fleet recommended Claimant engage in such activities on an "occasional" basis only. Additionally, Mr. Stewart noted that a "cargo checker job" required checking temperatures of cargo and would require "frequent to constant use of both extremities." He indicated that up to 66% of the time, Claimant would use his hands in "reaching and grasping activities." I find this further indicates the unsuitability of the position, as Dr. Fleet restricted Claimant's use of his left hand in grasping activities. Accordingly, I find and conclude Claimant's pre-injury job does not constitute suitable alternative employment because it does not conform to the work restrictions assigned by Dr. Fleet.

The November 3, 2004 labor market survey identified the following nine positions as "alternate jobs" that Claimant could perform within his restrictions: (1) order clerk, (2) dispatcher, (3) surveillance system monitor, (4) courier/messenger, (5) parts sales person, (6) self-service station attendant, (7) cashier, (8) counter attendant, and (9) hotel clerk. The labor market survey indicated the foregoing positions fell within "sedentary" or "light" work and indicated an average number of "annual openings" for each position. I find the "alternate jobs" do not establish suitable alternative employment because Employer does not identify the specific activity requirements of each position. Additionally, the fact that there are "annual openings" for each position does not establish that these kinds of jobs were actually available. Consequently, I find and conclude that the identified jobs, without more, do not constitute suitable alternative employment.

The November 3, 2004 labor market survey also identified the following four positions as suitable for Claimant: (1) a concierge position, (2) a valet runner, (3) a counter attendant, and (4) a dining room attendant. I find the physical requirements of the concierge position fall within the restrictions assigned by Dr. Fleet. Additionally, given Claimant's prior office experience and education, as well as possible on-the-job training, I find that Claimant is capable of performing the concierge duties. However, the labor market survey described the available position as "full-time." Consequently, I find that the concierge position does not constitute suitable alternative employment because Dr. Fleet restricted Claimant to part-time work only, four hours per day and five days per week.

I further find that Employer did not establish suitable alternative employment through the remaining three jobs identified in the November 3, 2004 vocational report. The valet runner position was available on a part-time basis and was considered "light duty" work, which complied with Claimant's lifting restrictions. Additionally, Claimant alternated sitting and standing, which I find suitable because Dr. Fleet allowed standing/walking for two hours each day and sitting for up to six hours each day. Additionally, the occasionally required stooping and bending activities fell within the assigned restrictions. However, as noted by Dr. Stokes and Mr. Stewart, Claimant's difficulty in turning his head could interfere with his ability to perform valet duties. Mr. Stewart also opined the valet position would require frequent use of Claimant's hands and left arm; Dr. Fleet specifically restricted Claimant's use of his left hand. Consequently, I find that the valet position is not suitable alternative employment.

The counter attendant and dining room attendant positions similarly do not constitute suitable alternative employment. As with the valet runner position, the counter and dining room attendants were able to alternate standing and sitting. Bending and stooping activities occurred on an occasional basis as well. However, the job descriptions identify the maximum lifting weight as 25 pounds, which falls within Claimant's restrictions only if it occurs on an occasional basis. The job descriptions do not indicate the frequency of such lifting, merely indicating that "assistance can be provided." Without further specification as to the frequency of the lifting requirement, I find that the counter attendant and dining room attendant positions do not fall within Claimant's restrictions. Mr. Stewart objected to the two attendant positions because the

positions required frequent to constant use of Claimant's hands and dominant left arm. Again, I find that Claimant's left hand restrictions preclude Claimant from engaging in work that would require frequent use of the extremity. Accordingly, I find the counter attendant and dining room attendant positions do not comport with Dr. Fleet's restrictions and do not establish suitable alternative employment.

The Board has held that the fact that a claimant works after his injury does not preclude a finding of total disability. Haughton Elevator Co. v. Lewis, 572 F.2d 447, 7 BRBS 838 (CRT)(4<sup>th</sup> Cir. 1978); Walker v. Pacific Architects & Eng'rs, 1 BRBS 145, 148 (1974); Offshore Food Serv. V. Murillo, 1 BRBS 9, 14 (1974). However, the Board has cautioned against a broad application of these cases and has emphasized that circumstances which warrant an award of total disability, concurrent with a period where the claimant is working, are the exception and not the rule. Shoemaker v. Sun Shipbuilding & Dry Dock Co. 12 BRBS 141, 145 (1980); Chase v. Bethlehem Steel Corp., 9 BRBS 143 (1978); Ford v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 687 (1978). An award of total disability concurrent with continued employment has been limited to situations involving a "beneficent employer" or involving a claimant who works only due to an "extraordinary effort" and in spite of excruciating pain and diminished strength. Shoemaker v. Sun Shipbuilding and Dry Dock Co., 12 BRBS 141 (1980), citing Walker v. Pacific Architects & Eng'rs, supra; Haughton v. Elevator Co. v. Lewis, supra; Richardson v. Safeway Stores, 14 BRBS, 855, 857-58(1982).

Claimant was employed on a part-time, "as needed basis" with Mike's at the time of formal hearing. According to Claimant's testimony, he earned a total of \$1,080.00 from June/July 2004 through the date of formal hearing, at an hourly rate of \$6.00. The record does not indicate that Claimant worked in excruciating pain, nor does it indicate that the job was available only through the beneficence of the employer. In fact, Claimant testified that he had "no problem" carrying various items for delivery. As in Shoemaker, supra, the record indicates that Claimant received wages for the satisfactory performance of his duties. Consequently, I find the part-time job establishes suitable alternative employment. Assuming Claimant began his employment on July 1, 2004 and earned a total of \$1,080.00, I find Claimant earns an average weekly wage of \$60.00 per week ( $\$1,080.00 \div 18 \text{ weeks} = \$60.00$ ).

Based on the foregoing, I find and conclude Claimant is entitled to permanent partial disability benefits from December 29, 2004 through present and continuing, based on two-thirds of the difference between his average weekly wage of \$588.83, and his weekly wage earning capacity of \$60.00 per week.

#### **E. Average Weekly Wage**

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, *supra*, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), *aff'd sum nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.

In addition, Claimant worked as a barge surveyor for only 10 weeks for the Employer in the year prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979) (33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979) (36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990) (34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

Claimant did not work for "substantially all of the year" prior to his September 2002 injury and the record is devoid of payroll data reflecting the wages of a similarly situated employee. I conclude that because Sections 10(a) and 10(b) of the Act can not be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this

matter.

The record contains an "Itemized Statement of Earnings" for Claimant provided by the Social Security Administration. It indicates Claimant earned a total of \$5,888.25 during his employment with Employer and a total of \$8,081.00 during his prior employment with Valley Builders. Employer urges an AWW based on Claimant's total earnings with both employers divided by 52 weeks. However, the payroll records from Valley Builders indicate that Claimant was employed from March 15, 2002 through June 15, 2002. I find that the calculation proposed by Employer would not accurately reflect Claimant's earning capacity at the time of his injury because it is not representative of his earnings for the preceding 52 weeks. I find that application of Miranda is most appropriate in the instant case, as it best reflects Claimant's wage earning capacity at the time of his work injury. As Claimant earned a total of \$5,888.25 during his 10 weeks of employment with Employer, I find and conclude he earned an average weekly wage of \$588.83 ( $\$5,888.25 \div 10 \text{ weeks} = \$588.83$ ) at the time of injury.

#### **F. Entitlement to Medical Care and Benefits**

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically

disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4<sup>th</sup> Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Having found Claimant sustained a compensable work-related injury, I find and conclude Employer is responsible for all reasonable and necessary medical expenses arising out of the work-related injury related to his neck, left shoulder, back, and left arm/hand.

#### **V. SECTION 14(e) PENALTY**

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall

be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer was notified of Claimant's injuries on September 18, 2002, and began paying compensation benefits on September 19, 2002. Employer filed its notice of controversion on May 1, 2003. Employer filed its second notice of controversion on January 21, 2004.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due<sup>59</sup>. Thus, Employer was liable for Claimant's total disability compensation payment on October 2, 2002. Because Employer began compensation payments on September 19, 2002, Employer is not liable for any penalties. Further, Employer timely filed a notice of controversion when it ceased payments on April 30, 2003. Consequently, Employer is not liable for any penalties related to the discontinuation of compensation on April 30, 2003.

## **VI. INTEREST**

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District

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<sup>59</sup> Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

Director.

## VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.<sup>60</sup> A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary total disability from September 18, 2002 to December 28, 2004, based on Claimant's average weekly wage of \$588.83, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay Claimant compensation for permanent partial disability from December 29, 2004 and continuing based on two-thirds of the difference between Claimant's average weekly wage of \$588.83 and his reduced weekly earning capacity of \$60.00 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c) (21).

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<sup>60</sup> Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1<sup>st</sup> Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **March 30, 2004**, the date this matter was referred from the District Director.

3. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's September 18, 2002, work injuries, pursuant to the provisions of Section 7 of the Act.

4. Employer shall receive credit for all compensation heretofore paid, as and when paid.

5. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

**ORDERED** this 4th day of May, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.  
Administrative Law Judge